CHAPTER V. OF THE LIBRARY.

The Library Committee shall divide the books and other articles belonging to the Library into three classes, namely: (a) those which are not to be removed from the building; (b) those which may be taken from the halls only by written permission of three members of the committee, who shall take a receipt for the same and be responsible for their safe return; (c) those which may circulate under the following rules.

Members shall be entitled to take from the library one folio, or two quarto volumes, or four volumes of any lesser fold, with the plates belonging to the same, upon having them recorded by the Librarian, or Assistant Librarian, and promising to make good any damage they sustain, while in their possession, and to replace the same if lost, or pay the sum fixed by the Library Committee.

No person shall lend any book belonging to the Institute, excepting to a member, under a penalty of one dollar for every such offence.

The Library Committee may allow members to take more than the allotted number of books upon a written application, and may also permit other persons than members to use the Library, under such conditions as they may impose.

No person shall detain any book longer than four weeks from the time of its being taken from the Library, if notified that the same is wanted by another member, under a penalty of five cents per day, and no volume shall be retained longer than three months at one time under the same penalty.

The Librarian shall have power by order of the Library Committee to call in any volume after it has been retained by a member for ten days.

On or before the first Wednesday in May, all books shall be returned to the Library, and a penalty of five cents per day shall be imposed for each volume detained.

Labels designating the class to which each book belongs shall be placed upon its cover.

No book shall be allowed to circulate until one month after its reception.

T. F. H.

A

VIEW

OF THE

JURISDICTION AND PROCEEDINGS

OF THE

COURTS OF PROBATE

IN

MASSACHUSETTS,

WITH PARTICULAR REFERENCE TO THE

COUNTY OF ESSEX.

BY DANIEL APPLETON WHITE.

"KEEP THEM STRICTLY TO FORMS, AND TO THEIR DUTY; AND THEY WILL BE REGULAR; BUT RELAX A LITTLE IN ANY CASE, AND THEY WILL LOOK FOR IT IN ALL."

WASHINGTON.

SALEM:

PRINTED BY J. D. CUSHING AND BROTHERS,

FOR CUSHING AND APPLETON.

1822.

NOTE.—In the bottom line of page 71, for *personal estate* read *person or estate.*

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III.

INTRODUCTION.

For some years previous to the resignation of my predecessor in office, the late venerable Judge Holten, it was generally expected that his successor, whoever he might be, would find it to be his duty to introduce important changes in the mode of conducting the probate business of this county. This was particularly impressed upon my mind, at the time of my nomination to the office, not only by undoubted indications of the public sentiment, and a uniform expression of individual opinions, but by letters received from several distinguished gentlemen of the county, who were then members of the state government, and who, in noticing my appointment, took occasion to represent to me the peculiar situation of the probate office in the county of Essex, "the evils which had been experienced, and the expectation that much would be done to remedy them."

Being thus led to consider the acceptance of the office as involving the duty of attempting some reform, it was my first object, by a careful examination of the laws and judicial decisions relative to the probate department, and of the practice and usages then prevailing in this county, to ascertain, in the best manner I could, the proper practice and course of proceedings to be adopted. In this inquiry I derived much aid from consultation with professional gentlemen who felt an interest in the subject, and who kind-

ly favoured me with their advice and assistance; and also from the practice and experience of the Courts of Probate in other counties, where the proceedings had been regulated according to the advanced state of the law.

The result of this investigation was a full conviction, that it was my duty to introduce more extensive alterations than I had before supposed would be necessary; though many difficulties appeared to oppose the undertaking, arising from the want of prescribed forms and processes for the Probate Court, and from the prevalence of old habits connected with the office in this county. These difficulties, while they increased the responsibility, seemed in no degree to lessen the obligation, of pursuing the convictions of duty. But in doing this, I endeavored to render the new system of practice as simple as possible, consistently with the main design of securing a legal and correct course of proceedings, as well on the part of the Court, as of those who act under its authority.

The propriety of presenting to the public a particular statement of the rules and principles of this system of practice, as a more satisfactory guide to parties in their applications to the Probate Court, has often occurred to me; and this is now rendered the more expedient and necessary by the imperfect and erroneous statement, which has been produced by the Honorable House of Representatives. It is no less due to myself, than to the good people of this county, to exhibit to them a full view of the practice and course of proceedings adopted in the Probate Court, with an

exposition of the laws upon which they are founded. This is the object of the following pages.

In considering the laws upon this subject, it has appeared to me that a concise historical review of them, and of the probate jurisdiction in Massachusetts, with some account of the former practice of the Probate Court in the county of Essex, might be useful, and in some degree interesting.

It is my design, therefore, in the first place, to take a very general view of the progress of the Probate Law and Jurisdiction, under the Colonial, Provincial, and State governments.

Secondly, to give a general account of the former practice of the Probate Court, in this county, the changes which have been recently introduced, and the reasons for introducing them.

Thirdly, to exhibit in detail the present practice and course of proceedings, in all the usual and important applications to the Probate Court, with particular notices of the former practice, and a brief abstract of the rules of law, most pertinent to each case, as contained in the Statutes and Judicial Reports of this Commonwealth: concluding with some observations upon the proceedings of the Honorable House of Representatives connected with this subject.

I.

HISTORICAL VIEW OF THE PROBATE JURISDICTION.

The Probate Law and Jurisdiction, as they are now found to prevail in this Commonwealth, have grown up gradually from the simplest beginnings. The Colony Charter contained no particular provisions, as to establishing courts for the administration of justice, or for the probate of wills and settlement of intestate estates; and our forefathers, in providing for these objects, had to consult only their peculiar situation and circumstances. Though familiar with the distinction between the civil and the ecclesiastical jurisdiction in England, they were never inclined to introduce it here; nor would the constitution of their churches have admitted it. The leaders among them were wise and practical men, and well understood how to adapt their laws and institutions to the condition of a new and growing settlement, and to vary and extend them, as their experience dictated, without transplanting more from the parent country, than was applicable and useful. As, in the infancy of the colony, they saw no necessity for a distinct court to take the probate of wills and grant administrations, they gave jurisdiction of these subjects to

the County Courts of common law; and it remained with these courts, during the existence of the first charter, with appeal, as in other cases, to the Court of Assistants.

The clerk of each County Court was the recorder for the county, as well of all testaments and deeds of conveyance, as of judicial proceedings; and in 1639, it was ordered, that records should be kept of all wills, administrations, and inventories. In 1652, experience having shewn the great inconvenience, in many cases, of waiting from one County Court to another for the probate of a will or taking administration, it was ordered, that any two magistrates, with the recorder, or clerk, of the County Court, meeting together, should be authorized to allow of any will, on the oath of two or more witnesses, and also to grant administration on the estate of any person dying intestate, to the next of kin, or to such as should be able to secure the same for the next of kin; the clerk to inform the rest of the magistrates, at the next County Court, of such will proved, or administration granted, and to record the same. The provision here made for granting administration *to such as might secure the estate for the next of kin*, was doubtless intended for the case of deceased strangers and others, leaving no heirs in the country; such cases being among the principal reasons assigned for this ordinance. The preservation of estates so situated for the rightful heirs was in those days an object of much importance.

In 1648 it was agreed and established by the four United Colonies of New-England, that when the last

will and testament of any man was duly proved and certified from any one of the colonies, it should be allowed in the rest, unless some just exception were made to it, or to the probate of it; in which case, such exception should forthwith be certified back to the colony where the will was proved, that some just course might be taken to gather in and dispose of the estate without delay or damage: Also, that when any known planter or settled inhabitant died intestate, administration should be granted by the colony to which the deceased belonged, although he died in another colony; and, being duly certified, should be of force for gathering in the estate in the rest of the colonies. But when any person, possessed of an estate, who was neither a planter nor settled inhabitant, in any of the colonies, died intestate, administration was to be granted by the colony where he died; or at least due care taken by the government to gather in and secure the estate, till it should be demanded and delivered according to the rules of justice.*

The Massachusetts colony laws were few and simple in relation to the settlement and distribution of estates; and, as some of the provisions contained in them have continued in substance to the present day, a brief abstract of these laws is here given.

In 1647, dower was secured to widows in the real estate of their deceased husbands, and provision was made for the assignment of it, as at common law, by writ at the suit of the widow. And by an ordinance,

* 2 Haz. Coll. 124.

which in the second digest of the colony laws bears the dates of 1641 and 1649,* it was provided that when the husband or parents die intestate, the County Court should be impowered to assign to the widow such a part of the estate as they should judge just and equal; and also to divide and assign to the children, or other heirs, their several parts and portions: the eldest son to have a double portion, and, in case of no sons, the daughters to inherit as copartners; unless the Court, upon just cause alledged, should otherwise determine. So far as respected the widow, this has been considered "rather a provision for an allowance of sustenance, than for an assignment of dower."† It seems most probable, however, that it was intended to authorize the assignment of dower, as well as distribution among heirs; and that it was so understood in practice, although expressed in terms admitting much latitude of discretion in the Courts, as to widows, and which they in fact sometimes exercised as to children and heirs. Hutchinson, in his history of Massachusetts, speaking of our ancestors in relation to this branch of the colonial jurisprudence, says: "In the beginning, they so far

* Editions or digests of these laws were made in 1648, 1658, and 1672. The provisions of various acts, passed in different years, relating to the same subject, being brought together in a condensed form, and the years merely noted at the end, it is not always possible to ascertain the time when any particular provision was first introduced. Probably the one here remarked upon was adopted in 1649; subsequent to that for the assignment of dower by writ at the suit of the widow.

† ix Mass. Rep. 9.

followed the civil law as to consider real estates as mere *bona;* and they did not confine themselves to any rules of distribution then in use in England, and which afterwards were more fully established by the statute of distributions. They considered the family and estate in all their circumstances, and sometimes assigned a greater portion to one branch than another; sometimes they settled all upon the widow; in other cases assigned the whole estate to the administrators, or to any relation who would undertake to support or provide for the family, and pay certain sums to the children, when they came to age or marriage. When they established a general rule, they conformed very near to the rules respecting personal estate in England; only they gave the eldest son a double portion; and, in the real estate, the widow generally was considered for her dower only; but still, according to the circumstances of the estate and family, the court would consider the widow, and allow her a greater or lesser part, and enjoin her to take care of the children unable to provide for themselves, in proportion to what she received."*

In 1649, in consequence of a prevailing practice of entering upon the estates of deceased persons, and wasting or disposing of them to the prejudice of creditors, without a legal administration, it was ordered that, if any executor knowing himself to be nominated such in any will, should not make probate of it at the Court holden next after thirty days from the decease of the testator, or have it recorded by the

* 1 vol. 393.

clerk; and if any person whatever should not, within the same time, take administration of all such goods, as he should enter upon, of any party deceased; or if any person or persons should alienate or embezzle any lands or goods, before proving the will, or taking administration, and bringing in a true inventory of all the known lands, goods, and debts of the deceased; every such person should be liable to pay all the debts the deceased owed, whether he left estate sufficient or not, and to forfeit to the country five pounds for every month's neglect to prove the will, or to take administration. And when any one nominated executor renounced the trust, or when the friends and kindred of an intestate neglected to seek administration, it was made the duty of the clerk of the writs of the town where the deceased lived, to give notice thereof to the Court, within one month, that they might take such order thereon as they should think proper.

Such is the substance of the acts and ordinances on these subjects, which were in operation, for any length of time, under the colonial government. There was no standing law for the distribution of insolvent estates of deceased persons till 1677, a few years before the charter expired. Previous to this, it was usual for the General Court, on special application, to appoint commissioners for the purpose. In 1685, when the charter was in fact vacated, additional powers were given to the County Courts for enforcing a prompt and just settlement of estates; from which it appears of how early an origin is the great evil of procrastination in these concerns. The Courts were

authorized to summon any executor duly to return an inventory, or to give bond for payment of debts and legacies, and in case of refusal or neglect, to impose a fine of ten pounds for every month's default; and, on complaint, to call any executor to render an account of his administration: Also, on complaint of any legatee or creditor for detaining any legacy or debts due, to summon any executor before them, and, on his neglect to appear, to proceed to a hearing of the case, to make their judgment or decree therein, and to grant execution for fulfilling it; and, generally, to hear and determine all cases relating to wills and administrations, and to issue executions upon the judgments given.

There could hardly have been opportunity for the exercise of these important powers, as a revolution immediately took place in the government; and, with it, an entire change in the course of probate proceedings. Dudley, being president of the council appointed the year following for the government of New-England, assumed to himself the jurisdiction of wills and administrations; and Andros, who arrived soon afterwards, continued to exercise the same authority as supreme Ordinary, obliging the people to come from all parts of the colony to the seat of government for the transaction of their probate business. A Judge of the prerogative court was appointed for Plymouth colony, and probably also for the other colonies of New-England; but we learn from Hutchinson's history, that wills were sent to Boston for final decree, and also administrations, if the estate exceeded fifty pounds. The circumstance

most deserving of notice, connected with this short and arbitrary reign, is, that the few forms which subsequently prevailed in the several counties, in proving wills and taking administrations, were then first introduced from the spiritual courts of England. Previous to this period, the proceedings in such cases were very loose and uncertain.

The revolution, which next followed in the civil affairs of the colony, and which was completed by the Province Charter granted by William and Mary in 1691, was in no respect more important and beneficial to the country, than by its influence on our laws and institutions for the administration of justice. The legislative and judicial powers were no longer blended together as before; and Courts of Judicature were established upon sounder principles, adapted to the advanced state of society and of jurisprudence. The old Court of Assistants, the County Courts, and those of Commissioners for small causes, gave place to the Superior Court of Judicature, the Courts of Common Pleas, Courts of General Sessions, and those of individual Justices of the Peace; all settled and organized, as they continued substantially to a recent period. The legislature, in creating these Courts, not only defined their duties and regulated their proceedings, but prescribed the forms of their writs and other processes, and gave them express authority for establishing necessary rules of practice. This was neglected to be done for the Courts of Probate; not because forms and processes were less necessary in these Courts, but from peculiar circumstances attending their origin and jurisdiction. By the new charter the Gov-

ernor and Council were authorized "to do, execute or perform all that was necessary for the probate of wills and granting of administrations for, touching or concerning any interests or estate, which any person or persons might have within the province." Thus the jurisdiction of these matters became wholly distinct from the common law courts, and ceased indeed to be dependent on the legislative power. Probate Offices were established in the several counties, and judges were constituted with probate jurisdiction to officiate as surrogates or deputies of the Governor and Council, who remained the supreme Ordinary or Court of Probate. An act, which the provincial legislature passed for erecting county Courts of Probate was negatived by the King; and no statute establishing such Courts, or providing for the appointment of Judges or Registers of Probate, existed till since the present constitution was ratified. But after Judges of Probate were appointed by the Governor and Council, laws were enacted recognising their jurisdiction, extending their powers and duties, and in some measure regulating their proceedings and decrees.

At first there was no law requiring stated Probate Courts; and it was probably a general practice for the Judge and Register to meet together, at any convenient time, to transact probate business, as had been usual with the two magistrates and county recorder. But, in 1719, it was enacted that Judges of Probate should have certain fixed days for making and publishing their orders and decrees; and that such days should be made known by public notifications in the several counties. And, at a subsequent period, it was

provided, that sheriffs and constables should duly serve all legal warrants and summonses, directed to them by any Judge of Probate; and that contempt of authority, in any cause or hearing before him, should be punished in like manner as such contempt of authority might have been in any of his majesty's courts within the province. As it sometimes happened, that a Judge of Probate was also a Judge of a common law court, or might be in practice at the bar, it was thought proper to guard against any interference of these several capacities; accordingly, in 1727, it was enacted that no Judge of Probate should have a voice in judging or determining, or be admitted to plead or act as attorney, in any civil action depending on, or having relation to, any sentence or decree made by him in his said office.

In some cases the legislature directed the course of proceedings in the Probate Court, and took sufficient care to protect the rights of parties, who were not in a legal capacity to act for themselves, or who were out of the province. But, except in a few instances, no statute provision was made for giving previous notice to parties adversely interested in the proceedings. In this, as well as in regard to forms and processes, the Judges of Probate were left by the legislature to their own discretion, guided by the general rules of law, and such instructions as might be contained in their commissions, or otherwise received from the Governor and Council, who were the source of their authority and jurisdiction. Registers of Probate were required to give bonds for the faithful discharge of their trust, and for keeping up the records

of their respective courts; but there was no provincial statute, which defined their duties, or determined the extent of them, as to the matters to be recorded.

In the general revision of the colonial laws, which took place after the province charter went into operation, the regulations respecting the duties of executors and administrators, which had been found useful, were re-enacted with alterations and additions; various important provisions were introduced from the English statutes on similar subjects; and the jurisdiction of the Judges of Probate was considerably enlarged by the legislature. The manner of disposing of estates by will, the descent and distribution of intestate estates, and the right to administration of them, were clearly determined. The Judges of Probate were empowered to make division of the real estate among heirs; and, virtually at least, to assign dower to widows. It was manifestly convenient that they should have this power in the settlement of intestate estates, as the real estate descended and was distributed by the same rules as the personal; and as they had cognizance of wills of lands, in like manner as of those concerning personal property, they were at length empowered also to make partition among devisees. But in these cases the Courts of common law always had concurrent jurisdiction.

Various other duties, more or less connected with the administration of estates, were at different periods assigned to the Judges of Probate; as appointing guardians for minors, also for idiots and distracted persons; appointing commissioners on insolvent estates, and causing an equal distribution among credi-

tors of the deceased; summoning before them such as were suspected of concealing or embezzling the effects of deceased persons, or of those under guardianship; issuing warrants against delinquents for not paying their proportion of costs attending the partition of real estate; and making allowance of necessaries, in certain cases, to the widow and family from the estate of her deceased husband.

An appeal lay, in all cases, from the orders, decrees, sentences or denials of a Judge of Probate, to the Governor and Council; to be claimed within six months; the appellant to give security for prosecuting it within ten days, and to file reasons of appeal within ten days after security given, and fourteen days at least before the hearing by the Governor and Council.

The revolution, which abolished the Province Charter, led to the formation of the State Constitution, and fixed a new era in the history of our laws and civil institutions. The Constitution, while it continued in force the laws which had been adopted and used in the colony or province, and thus in effect confirmed the common law, abrogated of course whatever was repugnant to the rights and liberties it established; and, by settling the principles on which rest the rights of every individual, as well as of the whole people, it necessarily required a change in all juridical proceedings, where usages had grown up inconsistent with these principles. Upon the adoption of this Constitution, a second general revision of the laws succeeded, and was made under greater advantages than attended the first. The General Court of the Commonwealth

had not, like that of the Province, any foreign interference or control to apprehend, and could fully avail themselves of the wisdom and experience of former times, added to the more enlightened jurisprudence of their own. If the Probate system did not receive all the benefit that might have been expected from such revision, it may be attributed to circumstances peculiarly affecting this department. As the manner and forms of proceeding in the Probate Courts had never been subjects of statute regulation, the legislature did not now direct their particular attention to them; nor to the inquiry, how far the usages which prevailed in these courts were conformable to the requisitions of law. It has generally happened that those who possess a leading influence in revising and making our statutes, while intimately conversant with the common law tribunals, have had little practical knowledge of probate proceedings, and less inclination to undertake the labor of legislating about them in detail.

In the course of a few years, most of the statutes on subjects cognizable by the Probate Court were revised; a more lucid arrangement was given to them; provisions, relating to the same subject, contained in various province laws, passed at different periods, were brought together into one statute, with such additions and amendments as experience had suggested. From a laudable disposition to avoid unnecessary change in the laws re-enacted, the language in which they were originally framed was generally preserved; and hence it is not surprising if some obscurities were transmitted, and some needless provisions retained. But the improvements, introduced into the probate laws by

this revision and the acts of succeeding legislatures, illustrated by the decisions of the Supreme Court, are very considerable. Much has been added to their clearness and precision; and although much has also been added to the responsibility of the Judges of Probate, it has become less doubtful how they ought to exercise the discretion reposed in them.

The constitution recognised the office of Judges of Probate, and ordained that they should hold their courts on fixed days, at convenient times and places; and that all appeals from them should be heard and determined by the Governor and Council, until the legislature should by law make other provision. In 1784, by the act for establishing Probate Courts in the several counties, it was enacted, that some able and learned person, in each county, should be appointed Judge, for taking the probate of wills, and granting administrations; for appointing guardians to minors, idiots and distracted persons; for examining and allowing the accounts of executors, administrators and guardians; and for such other matters and things as the Courts of Probate should have cognizance and jurisdiction of by the laws of the Commonwealth; with full power and authority to make out such process or processes, as might be needful for the discharge of the trust reposed in him: and that a suitable person should be appointed Register of wills, administrations, accounts, decrees, orders, determinations, and other writings, which should be made, granted, or decreed upon, by the Judge of Probate; who should be sworn to the faithful performance of his duties, and have the care, custody

and keeping of all the files, papers and books, belonging to the probate office.

By the same act, the Supreme Judicial Court was made the Supreme Court of Probate, to have thereafter appellate jurisdiction of all matters determinable by the respective Judges of Probate; and original cognizance of all matters, wherein the Judge of Probate should be a party, or interested. The provisions, contained in the province laws, for the service of all legal warrants or other process from any Judge of Probate, and for punishing contempt of authority in any cause or hearing before him, were re-enacted; as were also, by another statute of the same year, those requiring the Judges of Probate to have certain fixed days for making and publishing their orders and decrees, and restricting them from taking part in judging or determining, or acting as counsel or attorney, in any civil action depending on, or having relation to, any sentence or decree passed by them respectively.

The transfer of appellate jurisdiction from the Governor and Council to the Supreme Judicial Court was the principal change, made in the probate system by the statute establishing Courts of Probate. But, by limiting the time for claiming appeals to one month, it rendered more evident the duty of the Judge of Probate to give to parties, having the right of appeal, due notice of all judgments and decrees affecting their interest; for, otherwise, how could they have opportunity to avail themselves of the privilege of appeal? And by stating, with such precision and comprehensiveness, the duties of the Re-

gister, it necessarily required a greater degree of exactness, than had been usual, in the proceedings of the Court. If all the decrees, orders and determinations of the Judge were to be entered of record, it manifestly followed, at least, that they must all be made in writing.

The legislature added to the powers and duties of the Probate Court by various provisions introduced in revising the provincial acts, and they continued to extend them by a series of subsequent statutes, till a new revisal of the probate laws became necessary. Among these additional powers and duties may be mentioned the appointment of guardians to spendthrifts; removing executors, administrators and guardians; ordering the notice to be given on their appointment; receiving affidavits of the notice given; appointing referees in certain cases; ordering the sale of personal estate; granting certificate and taking bonds preparatory to the sale of real estate; ordering the sale of the reversion of dower in insolvent estates; ordering wills proved out of the government to be filed and recorded; issuing dedimus for taking the affidavits of subscribing witnesses to wills; requiring new bonds, when the former sureties become insufficient; taking bonds of trustees to minors and others, and in some cases appointing such trustees.

The multiplied provisions, relating to these and other subjects of probate jurisdiction, being enacted at different times, and involved in a great variety of statutes, were attended with so many difficulties and defects, that the legislature was induced to under-

take a revision of the probate laws, for the purpose of reducing these scattered provisions into a more systematic form, and incorporating such alterations and amendments as might appear necessary. The result of this revision was the act to regulate the jurisdiction and proceedings of the Courts of Probate.*

The object, which the legislature seems to have had in view, was in a great measure accomplished by this statute; but it was probably found inexpedient to make so complete a revision and digest of the probate laws, as was at first contemplated. Many parts of these appeared to be too closely interwoven with other statutes to admit of a separation without inconvenience; and some of the entire laws were thought to need no alteration. But we find in this new act most of the laws and provisions, connected with the probate department, brought together in an improved state, with important additions, chiefly respecting the powers of the Courts of Probate, the partition of real estates among heirs and devisees, and the duties of executors, administrators, guardians and trustees of the estates of minors and other persons.

The concurrent authority to license the sale of real estate, in certain cases, was now given to these Courts; and the power of granting administration on the estates of persons dying out of the Commonwealth, but leaving property within it, was declared in express terms; as was also the duty of passing all orders and decrees in writing, and having them duly

* Stat. 1817, c. 190.

recorded. A decree of approval was required on all bonds accepted by the Judge of Probate, and his consent and order were made essential, in a variety of cases, to the proceedings of executors, administrators and guardians, in the discharge of their respective trusts.

Additional restrictions, too, were imposed by this act on the Judges and Registers of Probate, in relation to being of counsel to parties. It was now enacted, "that no Judge of Probate shall be allowed or admitted to have a voice in judging and determining, nor be permitted to be of counsel, or to act as attorney, either in or out of the court, in any civil action, or other process or matter whatsoever, which may depend on, or have relation in any way to, any sentence, or decree, made or passed by him, in his office aforesaid. Nor shall he be of counsel or attorney in any civil action for or against any executor, administrator, or guardian, as such, within the county in which said Judge shall reside. And no Register of Probate shall be of counsel, or in any way, directly or indirectly, act as an attorney, in any matters and things whatsoever, which are or may be pending in the Court of Probate, of which he is Register, or in any appeals therefrom."

Although much was effected by the legislature in passing this important act, yet much that is most desirable was left unattempted by them. While the jurisdiction of the Courts of Probate has been thus constantly extending, and their duties becoming more complex and arduous, no sufficient guide has been provided for them in conducting their proceedings as to

the necessary forms, or processes; the legislature having done little more than to declare the power of the respective Judges to do what is needful in these respects. On some points, indeed, the statutes present a perplexing variety, if not inconsistency, which is calculated to mislead those, who look not beyond them. The duty of giving previous notice to adverse parties is in many cases left to be inferred, or understood, as of common right; while in others, without any apparent reason for the distinction, the legislature has expressly required it to be given. The statute, for instance, which declares the authority of the Judge of Probate to remove executors and administrators, contains no intimation as to previous notice to them; but that which gives the same power over guardians is very express on the subject. In some cases, however, when assigning an important duty to the Courts of Probate, the legislature has clearly pointed out the course to be pursued in performing it; and thereby indicated the proper course in other analagous cases. In providing for the appointment of guardians to spendthrifts; for filing and recording wills, proved out of the government; for the probate of wills from the evidence of depositions taken by dedimus; for granting administration on estates in which a Judge of Probate is interested; the statute, in each case, requires the application to the Judge to be made in writing, directs the notice to be given, and thus points out the general course of proceeding. But in no instance have any forms of procedure been prescribed by statute for these Courts; nor has the legislature attempted to produce a uniformity of probate proceedings

in the several counties. These, as under the province charter, being still left to the learning and discretion of the respective Judges of Probate, must of course vary, as the Judges have varied in their knowledge and application of the laws. In some of the counties, ancient usages prevailed, long after the constitution and statutes of the Commonwealth required a change; while in others they have been altered, not only in conformity to statute provisions, but to the rules and principles of the common law. It was natural for Judges of Probate, not conversant in these principles, to regard as essential to their proceedings only what was required in express terms by some statute; and thus, for example, to adjudge a man *non compos*, and assign the whole custody of his person and estate to another, without previous notice to him; although in granting guardianship over the property of a spendthrift, they would be strict in giving such notice, because, in this case, the statute happens to provide for it.

The decisions of the Supreme Court have at length removed all doubts of this nature, and plainly shewn the degree of caution and exactness necessary in the proceedings of the Judges of Probate; not only in conforming to statute regulations, but in regarding rights, which rest on the constitution and the common law alone. Notice to parties, whose rights are to be affected by such proceedings, is declared to be essential even to bring them within the jurisdiction of the Probate Court.

In proceedings at common law, if judgment has gone against a party, without his having had legal

notice of the action, it may be reversed by writ of error. But, as no writ of error lies to the Probate Court, a party, who is injuriously affected by any of its decrees, has no means of reversing them but by appeal; and, if he has had no opportunity of availing himself of this remedy, he has a right, whenever they are produced against him, to aver and prove their nullity.

This is settled and clearly explained in a case,* where his honor Judge Jackson delivered the opinion of the whole Court; in which they say: "If it appear, that the Judge of Probate has exceeded his authority; or that he has undertaken to determine the rights of parties, over whom he has no jurisdiction; whether the want of jurisdiction arise from their not having been duly notified, not regularly before him, or from any other cause; or that he has proceeded in a case expressly prohibited by law; in all such cases, the party aggrieved, if, without any laches on his part, he has had no opportunity to appeal, may consider the act or decree as void."

This preliminary view cannot be better closed, than with the following observations of the learned Chief Justice, in declaring the opinion of the Court in another case,† where the decree of a Judge of Probate, appointing a guardian to a person found to be *non compos*, was reversed for want of notice, and where other defects in the probate proceedings were apparent.

"We have been surprised of late to find an irregularity in the probate offices, in several of the coun-

* xi. Mass. Rep. 507. † xiv. 222.

ties; which we think it important should be corrected in their future proceedings. It consists in the omission to enter of record orders and decrees, which often have an essential and final effect upon property to a very considerable amount. In the case now before us, it appears that no formal decree was ever passed, declaring the appellant *non compos*; or, if passed, that the only evidence of it rests in the recital which precedes the letter of guardianship. This seems to us as irregular, as it would be for a common law court to issue execution, without any evidence of a judgment, except what might be contained in the execution.

"A Court of Probate, although not technically a court of record, ought to have a perfect record of all its orders and decrees; and it was for this purpose principally that the Constitution established the office of Register. Orders of notice, among other things, should be recorded; or, if not, should be filed, with the return upon them: and in all important decrees, if previous notice has been given, that fact should be recited in the decree.

"We have been thus particular, with a view to produce uniformity of practice in a court, whose duties and jurisdiction affect, at one time or another, every estate in the community. And it is the more important that this should be attended to in the probate offices, as any material defect will render the proceedings null at any period, when they shall be brought in question; it having been determined that orders and decrees of those courts may be avoided by plea; they not being, like judgments at common law, reversible by writ of error."

II.

THE FORMER PRACTICE OF THE PROBATE COURT IN THIS COUNTY, AND THE CHANGES RECENTLY INTRODUCED.

The cursory view which has here been taken of the progress of the probate jurisdiction, from the settlement of the country to the present time, is sufficient for the purpose intended. It enables us to account for the informal and loose practice which so long prevailed in the Probate Courts of some of the counties, and shews us that the practice ought now to be different. We have seen that under the colonial government no regard was had to forms in the probate of wills and granting administrations; that these were first introduced by Andros, acting as Ordinary, and though continued in use, had not the sanction of legitimate authority to recommend the extension of them; that under the province charter the Judges of Probate derived their jurisdiction from the Governor and Council, and were considered as their surrogates; and consequently that the legislature did not prescribe for their Courts, as they did for the Courts of common law, the necessary forms and processes. Hence the practice and usages of these Courts grew up without system or uniformity; and, being once settled, continued to exist against the spirit and principles of the constitution and laws.

In no part of the Commonwealth, perhaps, was this more remarkably the case, than in the county of Essex. The practice, which prevailed in the probate office here, and the usages of the Court, so far from having conformed to legal requirements, seem to have become, in many respects, more lax and irregular. We find, for instance, that soon after the first establishment of the probate office, letters testamentary, letters of administration, and letters of guardianship were recorded at length; but this practice ceased to be followed, and was not resumed, even after the law had so fully and expressly stated the duty of the Register to record all such papers. Letters testamentary, indeed, were not commonly issued. Correct forms of letters for administrators and guardians, and of warrants for commissioners were in use: but the irregularities, noticed by the Supreme Court, with others, which were still more the subject of complaint within the county, existed to a great degree at a very recent period.

It was thought to be a dangerous practice for a Judge of Probate, however pure his motives might be, to confer with a party about matters judicially pending before him, or to give advice and directions concerning them. This appeared necessarily to have a tendency unduly to influence the final opinions of a Judge, having the ordinary frailties of humanity, and to place at some hazard the rights of parties adversely interested. So also appeared the equally prevalent practice of omitting notice to such parties of proceedings, affecting their rights. The practice of performing important judicial acts by word of mouth only, and of course wholly omitting to enter them of record, was

less obvious to the public eye, but not less observable on a nearer view of the probate office. In almost all cases, the applications to the Probate Court were verbal; in many cases, the decrees and orders were also verbal, and the commissions or warrants, issuing thereupon, only in writing; and in some cases, the application, the decree and the warrant, or directions for carrying the decree into effect, were all verbal; and no trace of the proceedings was to be found on the probate files or records.

In thus referring to practices of the late probate officers, no reflection is intended upon those excellent and venerable men, whose attention was not awakened to the changes required by the progress of our laws and jurisprudence. But however excusable such a course of proceedings may have been in them, it would be unpardonable in their successors to pursue the same course, when the rules and principles of law, shewing it to be improper, have become too clearly settled to be mistaken.

The changes, introduced by the present Judge, in the mode of conducting the duties of his office, are chiefly the following:

First, to avoid, as far as possible, conferring or advising with parties out of court, and not in the presence of each other, concerning matters subject to his judicial determination.

Secondly, to require a written application to the Probate Court, signed by the party applying, his agent or attorney, in all cases, where facts are stated by him, necessary to be understood and considered by the

Court, as the ground of the decree or proceedings prayed for.

Thirdly, to order due notice to parties adversely interested, whenever it appears to be required either by statute provisions, or by the general rules of law.

Fourthly, to pass all orders, decrees and other judicial acts, proper to be recorded, in writing; and in like manner to issue all commissions, warrants, or directions necessary to be given, for carrying into execution any decrees or judgments of the Court.

Most of these regulations, being clearly required by the laws of the Commonwealth, will not now be called in question; but no one of them was adopted from a deeper sense of duty than the first, which appears not to be so fully understood and approved.

To those, however, who take an enlightened view of the judicial office, and of the constitution and laws in relation to it, it must be manifest, that every Judge is bound to keep his mind free from all influence upon his decisions, except what arises from the law and the facts of the case. We live under "a government of laws, and not of men;" and our Judges are to be "as impartial as the lot of humanity will admit." So declares the Constitution. Independently then of any statute prohibitions, no Judge is at liberty to lend an ear to the story of one party aside from the other; much less to confer and advise with such party about matters, which are to come judicially before him. And what is there to justify the Probate Judges in disregarding this obligation? Has the constitution or the laws made an exception in their favour? Has the legislature, by any of their acts, given them a promise

of impunity? The only distinction, to be found in our statute book, between them and other Judges, in this respect, consists in the more express provisions for guarding them against all improper influence. This surely seems to imply any thing rather, than that a less degree of caution is necessary to be observed by them.

The peculiar usages, which gave occasion to the restrictive provisions of the statute, had their origin in times very different from the present. Under the simple government of our ancestors, when the whole administration of the laws was rather paternal, than upon fixed principles; when those employed in the settlement of estates received no documents from the Court for their guidance, and could perhaps find no means of information, but by applying to the magistrates who appointed them, it was natural and even necessary for these magistrates to advise them in their proceedings. As controversies rarely happened in these matters, little inconvenience was found to attend such a practice. Similar circumstances, though operating with less force, induced the Judges of Probate, in some of the counties, to continue the practice long after the reasons for it had ceased to exist, and the principles settled by the constitution and laws had forbidden it. Our ancestors, however, were not ignorant of the sacred nature of the judicial office, nor wholly inattentive to the means of guarding it from undue influence. By the colonial laws, no relation of either party was allowed to sit in the cause, as Judge; and any person, who should ask advice of a magistrate, in a case wherein he might afterwards be plaintiff before him,

was liable to lose his action, and pay the costs; and a defendant doing the like was subject to pay a fine to the plaintiff. Had the restrictions, imposed by the legislature of the Commonwealth, been thus laid upon the parties, instead of the probate officers, there might have been less danger of a too strict compliance with the law on the part of the latter. The Judge would probably have been exposed to but few applications for advice in controverted cases; and it is not often much wanted of him in any other.

Still it is asked, why a Judge of Probate may not safely give advice and directions in cases where no controversy can happen. But how is he to distinguish such cases? Controversies often spring up unexpectedly to the parties themselves. Can the Judge possibly discern, in any case, that none will arise? Besides, if he had such a power of discernment, does the law except even such cases? May not the rights of parties, who have no means of being represented before him, be prejudiced by his becoming adviser, upon a partial hearing, of those opposed to them in interest? Can the Judge himself have perfect confidence in the correctness of opinions, given upon such partial hearing? Yet may not the result of them be the very subject of his future adjudication? And in deciding upon it will he be as impartial as the lot of humanity will admit? If he advise the particular acts of an executor, administrator, guardian, or other party accountable before him, does he not in some degree assume the responsibility of their acts? And just so far as he feels this responsibility, it is manifest, that his mind is disqualified

for impartial judgment, in any question that may arise respecting them.

But were the law less strict and universal, it would yet seem preposterous for a Judge of Probate, in the multitude of cases always pending in the probate office, each involving various and complicated concerns, and all beyond his personal knowledge, to attempt the task of advising about them, or giving any other than those general directions, which are contained in the documents usually issued from his court. Sufficient for him are his own arduous and appropriate duties; and the law has therefore confined him to these, as it has bound the Register, and those who act under authority from the Probate Court, to the performance of their respective duties, upon their own responsibility. For the Register to act the part of counsel, in matters before the Probate Court, is less incompatible with the nature of his office, than it would be for the Judge to do it; but the provisions of the statute are very express in restraining the Register from such a practice, the legislature considering undoubtedly that his own laborious employment demands his undivided attention. This is always a sufficient answer, why he should decline to interfere with his advice and counsel in the employments assigned to others. But is not the wisdom of the law manifest in thus confining the Judge and the Register, as well as executors, administrators, guardians, trustees, and commissioners, to their respective appropriate duties? Each of these is selected and qualified for his peculiar trust;

and therefore all their respective trusts are best fulfilled, while each keeps within his own province.

The general directions of the law, which it is proper for the Judge to give to those in subordinate trusts, are comprised in the various documents, with which all are alike furnished on their appointment. These are designed to be, when duly regarded, a sufficient general guide. The administrator, for instance, by looking into his commission, will see his duties, and be reminded at what time to return his inventory, and when to settle his account of administration. His order for giving notice prescribes the manner of doing it, accompanied with the requisite forms, not only for advertising, but for making affidavit of it, and mentions the time, within which the affidavit must be returned pursuant to law. The warrant of appraisal directs the proceedings of those, who are charged with this duty. So also upon the appointment of executors, guardians, trustees and others; the papers, suitable to each, as a legal guide, are invariably furnished. If more particular information becomes necessary from the peculiar circumstances of any estate, there are abundant means of obtaining it with strict propriety. The statutes and various directories, with abstracts of the laws on these subjects, are always to be found, as well as persons practically conversant in probate concerns, and qualified to advise about them in ordinary cases. There can seldom be occasion of applying to the Judge for information, but when advice of learned counsel is needed; and then perhaps it is more than ever improper to consult him.

As to a great variety of matters merely practical, or

about which no possible question can arise before the Judge of Probate, it is still the practice in Essex, as elsewhere, to give the directions which are incidentally called for, and especially to afford all necessary information, as to the modes of proceeding in the Probate Court, required to be observed by those who have business to transact there. This sort of information the present Judge has been desirous of communicating, whenever a proper opportunity has occurred; it being only on questions, which from the nature of the subject of inquiry, it appears to be inconsistent with his judicial duties to answer, that he feels bound to be silent.

The other changes mentioned respect the system of proceedings, adopted pursuant to the authority and obligation of the Judge of Probate, to make out and establish all needful processes for the business of his Court. In doing this, he must of course regard the duties and various acts, to be performed; and the directions of the law, as to the manner of performing them.

A petition of some sort and form to the Probate Court, with satisfactory evidence of certain facts, as the foundation of its proceedings thereon, is indispensable in all the principal cases. So also a decree or judgment of the Court must, in some form, be passed upon every application; and when passed, but not before, the judicial acts needful to carry it into full effect must be performed.

Thus, for instance, in granting letters of administration, the first requisite is a petition of the party applying therefor, shewing the decease of the intestate,

and other facts necessary to bring the case within the jurisdiction of the Court, and to exhibit the grounds on which the petitioner makes his claim. If no previous order of notice, or citation, is required; or, if required, after it is accomplished, the next requisite is a decree, granting or denying the prayer of the petition. If granted, and no appeal from the decree is made, the orders and judicial acts, depending upon it, then follow of course: as, accepting and approving the bond, issuing the letters of administration, appointing the appraisers, and directing the proper notice to be given by the administrator.

So in more simple cases, as causing partition, assigning dower, making allowance to widows, ordering the sale of real or personal estate, a decree upon the application precedes the executive order or warrant—a determination of the Court, written, verbal or mental, whether to do the thing prayed for or not, is necessarily formed before proceeding to effect it. Now, all these various orders, decrees, determinations and judicial acts, must, as we have seen, be made in writing, and entered of record; and appropriate forms for them are essential to method, dispatch and security, in the proceedings of the Probate Court.

To regulate the necessary forms and processes is indeed among the most difficult tasks left by the legislature to the discretion of the respective Judges of Probate. In attempting to accomplish this task here, it was an object to preserve as much simplicity and uniformity in the modes of proceeding, as was practicable, and to avoid all needless innovations. Consequently, the forms already in use were retained, with

little or no alteration; and regard was had to them, and to the analogies of the law, and the practice of other Courts, in preparing those which have been adopted.

The propriety of the changes introduced seems now to be generally, if not universally, admitted; except that of substituting written for oral petitions. Objections are still sometimes heard against this, as an unnecessary innovation. But when it is recollected that the rule requiring written applications is of limited extent, and that in all those cases, where the facts sufficiently appear to the Court without a statement of them by the party applying, the subject of his application is taken up and considered, on his verbal motion merely, these objections lose much of their weight; and, it is believed, they will wholly disappear, when the reasons of the rule are fully understood.

This regulation, to the extent adopted, appeared to be an essential part of a system of probate proceedings; and was suggested no less by legal analogy, than by its manifest usefulness. What better guide can the Judge of Probate find for the exercise of the discretion left to him in regulating the practice of his Courts, than the manner, in which the Legislature have exercised their wisdom in directing the practice of other Courts, in the discharge of similar duties, and of his own Court, so far as they have undertaken to prescribe the course of proceeding? This guide could not be mistaken, either as to the proper mode of application to the Probate Court, or the manner of executing its decrees. In the Courts

of common law, suits and petitions are made in writing, as well as the judgments rendered thereon, and the precepts of execution. Such practice is, in every judicial Court, manifestly essential to correct and orderly proceedings, both on the part of the Court, and of those to whom its authority is delegated. The Court, before passing judgment, must have sufficient knowledge of the facts and principles, on which it is founded; and those, who are required to execute it, must clearly understand what they are directed to do. This, in a multiplicity of complex business, cannot be accomplished by oral petitions and directions: and hence the necessity of written applications, in all cases, where facts are to be exhibited by the suitor, demanding the deliberate consideration of the Court.

The experience of almost all tribunals for settling claims and dispensing justice has immemorially sanctioned this practice; and, therefore, it seems the more extraordinary, that objections should be made to its adoption in the Probate Court: for no where can it be more necessary, than it is here, to safe and correct proceedings. The conductors of suits in this Court are not, generally, like those in the Courts of common law, conversant in the business they undertake, and familiar with the laws and with legal proceedings, and cannot therefore be expected to state, with more clearness or precision, the facts they intend to present for the consideration of the Court, nor always to discern what facts are material. Besides, it is known to be an uncontrolable custom for probate suitors to throng the Court at once with a great

variety of applications, each soliciting immediate attention to his own, while many of the parties too are personally unknown to the probate officers. What can more tend to create confusion in the mind of a Judge, and to disqualify him for patient deliberation and correct decision, than such a press of various petitions, verbally and imperfectly stated, and often on authority, which cannot be satisfactory? How is it possible for him to have a clear view of the facts in each case, and to keep them in his mind distinct from the facts in other cases, when all are thus presented to him in quick succession; even were there no defect in the evidence which supports them? In England an affidavit is required of the party taking administration. This would seem not unreasonable; but the signature of the petitioner, his agent, or attorney, to the statement of facts made by him, is surely the lowest degree of satisfactory proof.

In this view alone, the propriety of the rule requiring written applications is sufficiently manifest; but it is most important, as conducing to the orderly, prompt, and correct proceedings of the Court. Petitions in writing, however multiplied, may be taken up distinctly, and each deliberately considered. Parties too, especially if aided by appropriate forms, can more clearly and truly, as well as more conveniently, exhibit their facts in written petitions, prepared with consideration, than by a verbal statement. The practice, therefore, is as reasonable, as it is important. It has also the sanction, both of the legislature and of the Supreme Court of Probate. In those cases, wherein the legislature has had occa-

sion to prescribe the course of proceeding in the Probate Court, as before intimated, the application is directed to be made in writing; why then should it not be so made in similar cases, left to the regulation of the Judge? Does the probate of a will by affidavits, or granting letters of administration where another Judge is interested, require a peculiar *mode* of application to the Court? If not, that which is proper in such instances, is proper in all applications for the probate of wills, and granting letters of administration. The Supreme Court evidently consider it as a matter of course, when a Judge of Probate is applied to for license to sue a probate bond, that "an application be made to him in writing;" and thus implicitly recommend the practice in all similar cases.* (c)

The principal objection to the substitution of written for oral applications undoubtedly arises from the increase of probate expenses attending the change. But with respect to the fees of the Judge, who is alone responsible for it, no difference is made by this change; his decrees and services being the same, whatever may be the mode of applications to him. It therefore furnishes no just ground for any insinuation of "abuses, under pretence of other services, by multiplying forms or enhancing fees." The labors of the Register are, indeed, much increased by having the applications of suitors, as well as the consequent acts of the Court, made in writing; and they are much increased also by his more strict observance

* xvi Mass. Rep. 528.

of the statute prescribing his duties, and his entering of record many papers and decrees, which it was not before customary to record. How he can lawfully omit doing all this, while the statute continues thus express and comprehensive, it is difficult to discern. Whether it would be an improvement, after providing that all orders and decrees of the Probate Court, with the facts on which they are founded, should be recorded, and prescribing the forms of commissions, warrants, and other documents issued by the Court, as well as of all bonds taken, to dispense with the record of these formal papers, is for the consideration of the legislature.

As the state of the law in relation to probate fees appears not to be generally understood, it may be proper here to make some explanatory observations upon the subject.

Soon after the arrival of the province charter, an act was passed regulating the fees of various public officers, and forbidding the taking of greater fees for the matters therein mentioned. Specific fees were prescribed for the services then required of the Judge and Register of Probate, substantially as they have continued to the present time; except that none were provided for the appointment of guardians to minors, and that a difference was made in the fees for granting administration or probate of a will, between estates of thirty pounds and upwards, and all estates below this value. No other regulation of fees took place for about half a century, when this act was revised; the fees for granting guardianship of minors were then inserted, and the distinction as to greater

and less estates was taken away. Several other revisions of the fee bill were made, both before and after the revolution, but without any special reference to the Probate Court, and no material additions have been made to that of 1753; the fee for granting letters of administration has continued the same; those for probate of a will and for appointing guardians to minors have been lessened; and in controverted cases of administration or probate of wills, double the usual amount is allowed. Some other inconsiderable variations have been introduced; but the fees for the additional services imposed upon the Probate Courts, during the last hundred years, and now required to be performed, are left to be regulated by the officers entitled to receive them.

The prohibitory clause in every successive act for establishing fees has been limited, as at first, to the services therein specified; and the practice of the Probate Court, in this county certainly, has always been, on the performance of other services required by law, to receive such a fee as seemed reasonable, having regard to the provisions of the statute in analogous cases. Our antient records shew, for instance, that the fee taken for guardianship of minors, before the statute provided any, was the same as for granting administration; and it was then undoubtedly received with as much confidence, as the smaller fee has since been, pursuant to the statute regulation. The same rule has determined the fees taken for appointing guardians to idiots and to spendthrifts, after settling the preliminary facts, when the services become analogous to those in granting administration:

both of which cases are among those, which have never been included in the fee-bill.

The principle, upon which this practice has proceeded, is, that the probate officers, who are wholly paid by specific fees, are entitled to compensation for each duty performed, had no legislative provision been made; that the provision, which has been made, extends only to the services enumerated; and that for others, a reasonable fee is equally due, though not precisely ascertained.

This is no new principle; it is coeval with the probate jurisdiction, and was acted upon before the existence of the first statute for regulating fees. It may be considered as settled, too, by the legislature's uniform acquiescence in the practice upon it. In no instance has the legislature of the Commonwealth annexed the fees to new duties of the Probate Court, at the time of creating them; nor extended the provisions or the prohibitions of the fee-bill, so as to embrace them. Can it be presumed, that the fees established in 1692, or at the revision of them afterwards, have been considered a full compensation, both for the services then required, and for all which have since been imposed upon the Probate Courts? If so, would not these fees at least have been nominally augmented in some proportion to their real decrease in value? How great this decrease has been, a single fact will illustrate. At the period referred to, the fee of the Judge for the decree granting administration, for example, was the same as a day's pay for a member of the General Court; now it is but a quarter part as much, the one having been in-

creased four fold, according to the diminished value of money, and the other not at all. It would seem extraordinary indeed, if these statute fees, thus reduced in value, should nevertheless remain adequate, not only for the like services, but for many others in addition. Besides, if the legislature could have had such intention, why have they never declared it, nor taken any measures to give it effect? Why have they continued, for a century, to witness a practice contrary to it, without interposing their prohibition in a single instance, or attempting to render the law on this subject more certain and explicit? It is not to be imagined, that the law has been purposely left in this state, as a net set for the unwary, to be sprung or not, as the general impulse might direct. The fact, therefore, must be, that in assigning new duties and services to the Probate Courts, without prescribing the requisite fees, the legislature have always supposed this to be done in the manner it has been; and consequently have omitted to enlarge or improve the fee-bill, and adapt it to the changes and additions, which a constant course of legislation for so many years has made.

This, to the probate officers, is a most undesirable state of the law. It necessarily imposes upon each the unpleasant responsibility of regulating his own fees, so far as they are not ascertained by the statute; and this responsibility must rest upon them, till the legislature see fit to relieve them, either by making the statute of fees complete and certain, or, what would more effectually obviate every difficulty, by substituting fixed salaries.

The fees of the Judge are, of course, alone referred to in this discussion. The principle, upon which these are regulated, was intended to be that which has always been recognised in the probate office, extended and applied to the various duties not before required, or, if required, not performed. The first object has been to fulfil, as far as practicable, the intentions of the law, by performing the services it enjoins, and in the manner it directs; and then, for those, which are clearly not provided for by the statute, to receive such fees, as appear to be reasonable according to the rule of analogy.

The compensation thus derived was thought to be a right, appertaining to the office of a Judge of Probate, as undoubted as the obligation to discharge the duties, for which it is received; and after a careful revision of the whole subject, in consequence of the late public inquiry concerning it, no reason is discerned for a change of opinion, or for varying, in any material respect, the rules and principles before adopted in relation to these official services, or to the forms and course of proceedings in the Probate Court.*

* The services required of the Probate Courts by various laws, passed at different periods since the establishment of the probate office, for which the fees have never been regulated by statute, are the decrees and proceedings in appointing guardians of lunatics, guardians for spendthrifts, and trustees for minors and others; decrees respecting the assignment of dower, partition of real estate, making allowance to widows, ordering the sale of personal estate, licensing the sale of real estate, with many others.

While, in the existing state of the law, a reasonable compensation for all such services seems most clearly to be a *right* be-

III.

THE PRESENT COURSE OF PROCEEDINGS IN THE PROBATE COURT OF THIS COUNTY.

It remains to exhibit in detail the present practice and course of proceeding, in all the principal and most usual applications to the Probate Court, with more particular notices of the former practice, and such abstracts of law from the Statutes and Judicial Reports of this Commonwealth, as on a cursory examination have appeared to be most material to be regarded in each case; tracing also very concisely the progress of legislation, under the different forms of our government, upon some of the subjects contained in the

longing to the office of a Judge of Probate, it could not appear proper to settle a practice contrary to it in this county. But to the present incumbent it is less important to receive the compensation, than it is desirable to conduce to the satisfaction of those who have occasion for these services, and some of whom may possibly think that they ought to be rendered gratis. To give to such persons all the satisfaction, which he consistently can, he has, therefore, in relation to himself, instructed the Register to take no fees for this class of services from those, who express a conviction that none are rightfully due. A list of the fees, usually taken for the Judge, may be inspected at the probate office by any, who desire more particular information respecting them.

It is now the practice, and probably always has been, in the county of Essex, for the Register to take the fees for both officers, and to account with the Judge. Indeed, were it in all other respects perfectly proper, it would be impracticable, for the Judge, especially in a populous county, liable to a constant press of business at his courts, to give his attention to fees, in the midst of public duties demanding his whole consideration.

statutes referred to, or which are cognizable by the Courts of Probate.*

Of these various applications and proceedings, those will first be considered, which respect the appointment of administrators, executors, guardians and trustees: then, those which are usual in the discharge of these trusts, and particularly such as are proper for an administrator to make, in the course of settling an intestate estate; which will sufficiently exemplify those of executors, guardians and trustees, in performing similar duties.

These again may be considered in two general classes; first, all such as an administrator may be prepared, in any case, to make at the time of returning an inventory; and lastly, all subsequent and occasional applications.

* The rules of law, which are occasionally adduced in considering these applications to the Probate Court, and which are purposely taken from the Statutes and Massachusetts Reports alone, are necessarily very brief. The Statutes, however, from which any provisions are cited and abridged, are referred to for fuller information; and also the pages of the Reports, from which the extracts of judicial decisions are in substance taken.

The Statutes are cited, as is usual in the Reports, according to the year of the General Court which enacted them, and the number of that year. By this mode of reference, however, the acts of any winter session have the appearance of belonging to the preceding year: thus the late probate law, passed Feb. 24, 1818, is referred to as the statute of 1817, chapter 190, being the hundred and ninetieth act of that political year.

In the historical notices of the probate laws, as well as in the general view before given, "The Charters and Laws of the Colony and Province," and the Statutes of the Commonwealth, have been the principal source of information; but particular references to them were not thought to be necessary.

GRANTING LETTERS OF ADMINISTRATION.

By the provincial act of 1692, for the settlement and distribution of intestate estates, administration was to be granted to the widow, or next of kin, or both, as the Judge of Probate might think fit; or, upon their refusal, being thereto cited, to any of the chief creditors, or others, on their refusal; and bonds taken with sureties, as directed by the English statute of distributions. In 1719, it was enacted, that administration should be taken within thirty days after the decease of the intestate, and an inventory made within three months, by three suitable persons, to be appointed and sworn by the Judge of Probate. In 1723, in consequence of administrators *de bonis non* having frequently been appointed under pretence "of some right of commons in lands, or other real estate, whereby such administrators had given great disturbance to the proprietors of such lands," a law was passed, that no administration *de bonis non* should in future be granted, but where there was personal estate of five pounds unadministered, or debts of the like value, at least, unsatisfied.

These provisions, with others, were re-enacted in 1784; and the whole revised in 1818, by the act for regulating the jurisdiction and proceedings of the Courts of Probate.

Statute Provisions.

After the decease of any person intestate, administration of such intestate's goods and estate shall be granted to the widow, or next of kin, being twenty-

one years of age, or to both, as the Judge of Probate may think fit, within thirty days; and an inventory taken of all the real estate, goods and chattels, rights and credits, within three months, by three suitable persons, appointed by the Judge, and sworn to the faithful discharge of their trust. After the expiration of thirty days from the intestate's decease, in case the widow and next of kin refuse or neglect to take administration, being cited before the judge for that purpose, if resident within the county, administration may be committed to some one or more of the principal creditors; and, in case of their refusal, to such other person or persons, as the Judge may think fit.

When a person dies intestate without the Commonwealth, leaving estate within, any one interested is entitled to administration, as if the intestate had died within the Commonwealth; to be granted by the Judge of any county, wherein such estate is found, and to extend to all the intestate's estate within the Commonwealth. And, after notice by the administrator as in other cases, any subsequent administration on the same estate is void.

When a Judge of Probate is interested in the deceased's estate, it must be settled in the most ancient adjoining county; and upon application made in writing to the Judge of such adjoining county, for the probate of a will, or for letters of administration, he shall, after giving due public notice thereof, proceed to settle the estate as in other cases.*

* By the first act for establishing Probate Courts, the Supreme Court of Probate had original cognizance of "all matters," wherein the Judge of Probate of the county was a party or in-

Administration cannot be originally granted after twenty years from the decease of the intestate; nor can it be granted where there has been a former executor or administrator, unless it appears to the Judge, by the petitioner's affidavit, or otherwise, that there is personal estate to the amount of twenty dollars, or debts unpaid of the like value.

Every administrator, before entering upon the execution of his trust, must give bond, with good and sufficient sureties, being inhabitants of the Commonwealth, in the form prescribed by the statute, upon condition, among other things, to make and return a true inventory according to law, to render an account of his administration, within one year from the time of taking the trust, and to distribute and pay the residue remaining in his hands on such account as the Judge of Probate, pursuant to law, shall decree and direct. An order or decree of the Judge, approving the bond, must be passed upon this and all probate bonds, accepted by him, before they can be filed or recorded in the probate office.*

It is made the duty of every executor or administrator, after accepting his trust, to make known the same, within three months, by notifications thereof, posted up in some public places in the town where

terested. This act being repealed by the statute of 1817, c. 190, or probate law of 1818, as it is commonly called, which contains on this point the above provision only, all other matters in which the Judge of Probate is interested, seem now to be unprovided for by any statute.

* Stat. 1817. c. 190.

the deceased was resident, at the time of his death, and to give such further notice, as the Court of Probate, taking into consideration the situation of the estate and business of the deceased, shall in writing direct.*

Judicial Decisions.

The widow, if a suitable person to administer, is exclusively entitled to administration, unless among the next of kin there is some fit person, whom the Judge of Probate may prefer, or who he may think ought to be joined with the widow in a joint administration.†

Where a deceased person, was at the time of his or her death, an inhabitant of this State, the power of granting administration appertains exclusively to the Judge of Probate of that county, in which the deceased dwelt. The doings of any other Judge of Probate in the case are merely void.‡

The right of granting administration is not confined to the state or country, in which the deceased last dwelt. It is very common, and often necessary, that administration be taken out elsewhere. If a foreigner, or a citizen of any of the United States, dies, leaving debts and effects in this state, these can never be collected by an administrator appointed in the place of his domicil; and we uniformly grant administration to some person here for that purpose. This is the rule of the common law; and it is adopted, as we understand, in most of the United States.

In such case, however, the administration granted

* Stat. 1788, c. 66. † iv. Mass. Rep. 348. ‡ ix. 543.

here is considered as merely ancillary to the principal administration, granted in the jurisdiction where the deceased dwelt. It is true that such ancillary administration is not usually granted, until an administrator is appointed in the place of the deceased's domicil. But this cannot be a necessary pre-requisite; for if so, and it should happen that administration is never granted in the foreign state, the debts due here, under such circumstances, to a deceased person, could never be collected; and debts due from him to citizens of this State might remain unpaid.*

When the question before a Judge of Probate is only as to the manner of exercising his jurisdiction on a subject, of which some Court of Probate has jurisdiction, there, if he mistakes, the means of correcting such mistake is by appeal. But when the question is, whether the Court of Probate has jurisdiction of the subject or not, he must decide it, but at his own peril. If he errs by assuming a jurisdiction, which does not belong to the Probate Court, his acts are void.

It is not competent for any Judge of Probate to grant original administration, after the intestate has been dead twenty years; but it is a case in which the statute, from which he derives his authority, expressly provides that no administration shall be granted. The grant is therefore *ipso facto* a nullity.†

* xi. Mass Rep. 263. † ii. 120.

Course of Proceeding.

The former practice, in this county, was to issue letters of administration, with a warrant of appraisment upon a verbal application, without any decree or order in writing.

At present, both the application to the Court, and the decree, granting or denying administration, are made in writing: also a decree of approval upon the bond, after examining it, and an order directing the proper notice to be given by the administrator. No other order or decree is usually made. The papers issued are the letters of administration, the warrant to appraise, and the order for giving notice, accompanied with blank forms of notice, and of the affidavit to be made and returned thereof.

The petition for administration briefly states the name, last place of residence, and addition of the deceased; the time, as nearly as may be, of his death; the fact of his dying intestate, and leaving estate to be administered, and the grounds on which the petitioner claims administration; whether as widow, next of kin, creditor, or at the request of all or any of these. If it appears from the petitioner's statement, that his claim is exclusive, he is usually appointed, without requiring further evidence, than his own signature, or that of his agent or attorney, to his petition. But if it appears, that others have equal or prior claims to the trust, a citation, or order of notice, is first issued to them, unless rendered needless by their consent in writing to the petitioner's appointment.

Blank forms of petitions, as well as bonds, are kept by the Register for the accommodation of suitors. Furnished with these, they may conveniently have their petition and bond prepared and executed at home, taking care that the bond is unexceptionable, as to the penal sum and the sureties, and duly witnessed; and thus may be saved the trouble and expense of bringing sureties from a distance to the Probate Court. If the blank forms used are taken from the probate office, it will be easy to avoid any material error.

The penal sum of the bond should be double the amount of estate expected to come into the administrator's hands; and as the Judge, in most instances, can have no personal knowledge of this, nor of the sufficiency of the sureties offered, nor of the proper persons to be appointed appraisers, it is important to have the opinion in writing of those interested in the estate, or, where this impracticable, of the selectmen of the town, or of others known to the Judge, that the bond is good and sufficient, and that the persons named for appraisers are suitable to be commissioned as such. This may be contained in the certificate of consent to taking the administration, where such is produced; and may be procured with little difficulty in all cases.

The petition, bond, and evidence, being thus prepared, may be presented to the Court by an agent or attorney, when it is inconvenient for the petitioner to attend personally; and a single agent may thus act in behalf of all, in the same town or vicinity, who would be accommodated by his services. These ob-

servations are alike applicable to the case of proving a will, taking guardianship, and all others, where petitions are to be presented, bonds given, and appraisers appointed, and may be considered as extended to such cases, though not hereafter repeated.

THE PROBATE OF WILLS.

The provisions of various provincial acts, and of some English statutes in force here, relating to the manner of devising estates, to the probate of wills, and to the duties of executors, were brought together and revised by the Statute of Wills, passed in February, 1784. This statute remains unaltered by the probate law of 1818; except that the penalty, provided against executors for not seasonably presenting wills for probate, is now fixed at sixteen dollars, for each month's neglect, and is recoverable only by some party interested in the estate.

Statute Provisions.

Every person, of full age and of sane mind, has power to dispose of his real estate by will, made in writing, signed by him, or by some person in his presence, and by his express direction; and also attested and subscribed by three or more credible witnesses.

Creditors are competent subscribing witnesses to a will, though lands may be charged by the will for the payment of their debts. If a subscribing witness be a devisee or legatee, the devise or legacy to him is void, and he is nevertheless a competent witness to prove the will. So if the legacy be paid, or tendered and

refused, he is a competent witness. So also, if he die before the testator, or before receiving or refusing the legacy, he is deemed to have been a legal witness to the execution of the will.

No instrument, purporting a disposition of both real and personal estate, and not so executed as to pass the former, can be approved as a testament of personal estate *only*.

No nuncupative will can be approved within fourteen days from the testator's decease; nor till after process has issued to the widow and other persons principally interested, that they may contest it, if they please. Nor can testimony be received to prove the testamentary words, after the expiration of six months; unless the substance of them, at least, was reduced to writing within six days after they were spoken.

Any executor, knowing of his appointment, who does not, within thirty days from the testator's decease, cause the will to be proved and recorded in the probate office, or present it, and in writing declare his refusal, shall be subject to a forfeiture of sixteen dollars for every month's neglect, after the expiration of the thirty days; at the suit of any party interested in the estate, unless excused for sufficient reason by the Judge of Probate.

Every executor, taking upon himself the trust, shall give bond, with sufficient sureties, to return upon oath a true and perfect inventory of the testator's estate, within three months, and to render an account of his proceedings thereon, within one year; unless he is made residuary legatee, and then his bond may be for the payment of debts and legacies.

If the executor neglect for twenty days to give the requisite bonds, administration with the will annexed may be granted in like manner, as if he refused the trust; and when the executor is a minor, administration may be thus granted, during his minority. Where there are several persons named executors, none are allowed to intermeddle, except such as actually give bonds according to law.*

Executors are required, in the same manner as administrators, to give notice of their appointment and acceptance of their trust.

When it clearly appears to the Judge, either by the consent in writing of heirs at law, or by other satisfactory evidence, that there is no objection to the probate of a will, he may grant it, upon the testimony of one or more of the three subscribing witnesses, at his discretion; whether they are within the process of the court, or not.†

When the witnesses to a will, offered for probate, live out of the government, or more than thirty miles distant, or, by reason of age or indisposition of body, are unable to appear and give evidence before the Court, the deposition of such witnesses, taken before any person duly authorized by *dedimus potestatem* from the Probate Court, may be admitted to prove the will. But before the probate of a will is allowed from the evidence of affidavits, the same proceedings are to be had, as are prescribed in this statute for filing and recording wills proved out of the government. Application for the probate must be made in

* Stat. 1783, c. 24. † Stat. 1817, c. 190.

writing; and the Judge must assign a time and place for taking the same into consideration, and cause notice threof to be made in some public newspaper, three weeks successively, thirty days at least before the time assigned, that any person may appear and shew cause against such probate.*

Judicial Decisions.

The power of the Probate Court to issue a *dedimus* is recognized, but not originally given, by the statute of 1785, c. 12. The Judge may do it, in all proper cases, by virtue of his authority to make out such process, as is needful for the discharge of the trust reposed in him.

But a *dedimus* cannot issue in any case, unless a cause is so far pending, that proper parties are or may be in Court, with such a knowledge of the matters in controversy, as to frame with pertinence all the interrogatories, necessary to support their respective allegations.

In the Probate Court, when the controversy is upon the execution of a will, the will, as the foundation of the suit, must be present in Court, before a *dedimus* can issue. Until the original will is offered, the Judge has no authority to proceed.†

The manner, in which an executor of a will, proved out of the State, may execute his trust within, is regulated by the statute. The executor, or any person interested in a will, proved without the State, may produce a copy of it, and of the probate under

* Stat. 1785 c. 12. † v. Mass. Rep. 219.

the seal of the foreign Court, which proved it, before the Judge of Probate of any county, where the testator had real or personal estate, whereon the will may operate, and request to have the same filed and recorded, which the Judge, after notice and hearing all parties, may order to be done: and he may then take bonds of the executor, or may grant administration with the will annexed of the testator's estate lying in this government not administered, and may settle the estate, as in cases where the will has been proved before him. The executor of a will, proved without the State, cannot intermeddle with the effects of the testator in the State, but with the assent of a Judge of Probate, to whom he must first give bonds. Neither can an administrator with the will annexed intermeddle, unless he is appointed by some Judge within the State, who has authority to settle the whole estate within his jurisdiction.*

Where a feme sole is executrix or administratrix, jointly with one or more persons, and during the life of such person or persons, intermarries, her authority is, by the statute of wills, extinguished and determined. But where she is sole executrix or administratrix, and marries, her husband becomes joint executor or administrator with her.†

A *feme covert*, with the assent of her husband, may dispose of personal property by will; but she cannot devise her lands, even with such assent, so as to exclude the heir. If she make a will, during the life of her husband, and survive him, but does not repub-

* iii. Mass. Rep. 529. † vii. 510.

lish the will after his death, it cannot be effectual to pass her estate. The probate of a will is conclusive, as to real as well as personal estate.*

If a lunatic, under guardianship, be restored to his reason, he is capable of making a will, although the letters of guardianship have not been revoked.†

Publication of a will is necessary, though no particular ceremony is material. It must at least appear, that the testator knew, at the time of executing it, that it was his will.‡

Though it is usual to annex a seal to a will, this is not required by the statute.‖

An instrument, purporting to be a last will and testament, revoking all former wills, must have the same attestation to operate as a revocation, that is requisite to give it validity, as a will.§

If a testator, at the time of dictating his will, have sufficient discretion for that purpose, and, at the time of executing the will, be able to recollect the particulars, which he has dictated, it is evidence of a sound and disposing mind and memory.¶

A person, who is nominated executor in a will, cannot be admitted as a witness to prove the sanity of the testator, although he be a mere trustee, having no devise or legacy by the will.**

Where insanity, at a particular time, is attempted to be proved, evidence of it immediately before or after the time will be received; but evidence, which goes to shew symptoms of insanity long after the

* xii. Mass. Rep. 525. † xii. 488. ‡ i. 256. ‖ iv. 460.
§ xiv. 203. ¶ viii. 371. ** xi. 527.

time, is not admissible. Opinions even of physicians are not to be received as evidence of insanity, unless predicated upon facts, testified either by them or by others.*

The subscribing witnesses to a will may testify the judgment they formed of the soundness of the testator's mind, at the time of executing the will: the law places them around the testator, to try, judge, and determine whether he is *compos* to execute it. Other witnesses may testify to the appearance of the testator, and to any particular facts, from which the state of his mind may be inferred, but not merely their opinion or judgment.†

The legislature, in requiring three subscribing witnesses to a will, did not contemplate the mere formality of signing their names. An idiot might do this. These witnesses are placed round the testator to ascertain and judge of his capacity; and the heir has a right to insist on the testimony of all the three, at the probate of the will, if living, and subject to the process of the court.‡

The words *credible witnesses*, used in the statute of wills, must be construed to mean *competent witnesses;* and if a will be executed in the presence of three witnesses, who were competent to testify at the time of subscription, a subsequent incompetency, either by reason of interest or infamy, will not affect the formal execution of the will. A person named executor in a will, if he be not residuary legatee, and have no devise or bequest in the will, is a credible witness

* Mass. Rep. ix. 225. † iii. 330. ‡ iii 236.

within the statute: but after accepting the trust, he is not a competent witness to prove the execution of the will, or the sanity of the testator, on a trial in the Supreme Court of Probate; his liability to the costs of the trial being a sufficient objection to his competency. Nor can an executor, after accepting the trust, and giving bonds faithfully to perform it, be permitted to renounce his trust. The will, to which he is a subscribing witness, may be proved by the witnesses, who remain competent, or by other testimony.*

Members of a society, incorporated for pious and charitable uses, are competent witnesses to prove the sanity of a testator, notwithstanding the society are made residuary legatees in the will; being mere trustees, they have an interest too minute to influence them in their testimony.†

A will devising real estate, executed pursuant to the statute, and also a codicil bequeathing pecuniary legacies only, and not purporting a disposition of real estate, may both be approved; although the second instrument is not attested by three witnesses. The lands of deceased testators are not chargeable with legacies bequeathed in any last will, unless the will is executed in the manner prescribed for devising real estate.‡

If two executors are named in a will, and either of them seasonably presents it to the Probate Court, no forfeiture is incurred by the other: if both neglect, a joint forfeiture is incurred by both, which may be

* Mass. Rep. xii. 358. † vii. 398. ‡ xiv. 421.

sued for jointly; and perhaps separately, although but one forfeiture can be recovered. But if the neglect be in one executor, and not in both, the negligent executor alone incurs the forfeiture, and is alone to be sued.*

The usage has been for the executor to administer *ex officio* on the undevised estate of the testator, without taking out letters of administration; and we are satisfied that this is correct. The natural construction of the statute supports the usage; for the executor, by the probate of the will, has the administration of the testate estate, *according to the will*, and on undevised estate he is also directed to administer agreeably to the provisions respecting intestate estates.†

Course of Proceeding.

The principal change, introduced in the proceedings of the Probate Court, respecting wills presented for probate, is, that formerly the decree, allowing or disallowing a will, was passed upon a verbal request; no notice to the heirs at law was judged to be necesssary; and the warrant of appraisement was the only paper or document, usually issued by the Court: Now, the application for probate is made in writing; notice is ordered to the heirs and others interested in the probate, unless their written consent, or acknowledgment of notice, is produced; and letters testamentary, with a copy of the will annexed, are issued to the executor, together with an order directing the proper notice to

* iv: Mass. Rep. 137. † vi. 152.

be given of his appointment, and other papers, as in the case of granting administration.

The petition, accompanying the will presented for probate, is signed by the petitioner, his agent or attorney, and sets forth the testator's name, addition, last place of residence, the supposed time of his death, his being of full age, &c. shewing that he was legally capable of making the will, and that the Court has jurisdiction of it.

It is desirable also to have with the petition a statement of the names and residence of the heirs at law, as a guide to the Court in ordering the previous notice. In most cases, it cannot be difficult to obtain in writing their consent, or acknowledgment of notice, taking care that guardians be appointed for such as are minors. Where this is not practicable, and an order of notice becomes necessary, the will and petition may be offered to the Court, either by the executor, or any one in his behalf, and the requisite order taken. The kind of notice to be given depends on the situation of the heirs, and the circumstances of each case. Public notice in some newspaper, three weeks successively, in manner prescribed by the legislature in various instances, in which they have directed the manner of giving notice, is most commonly ordered; sometimes personal notice is required in addition to this; and when all, who are interested in the probate, may be conveniently notified in this way, personal notice is alone ordered.

The laws, before referred to, sufficiently shew in what cases the testimony of all the subscribing witnesses to a will, who are within the process of the

Court, must be produced at the probate of it, and when that of one only will suffice.

The probate of a will, as well as taking letters of administration, may be attended to either by the petitioner himself, or some agent or attorney in his behalf, as is most convenient; provided the bond and other papers are duly prepared, as already mentioned in considering the case of granting administration.

GUARDIANSHIP OF MINORS.

This case might have been considered first in order, as to give minors a legal capacity to act is not unfrequently the first step to be taken in the settlement of estates. It was early provided in the province laws, that before any decree was made concerning intestate estates, in which minors or others legally incapable of acting were interested, guardians should be appointed for them, who might have authority to appeal from any such decree.

The power of granting guardianship of minors was given to the Judges of Probate in 1693; some further regulations respecting it were made in 1752; and the provisions of both these provincial acts were revised and incorporated in the statute of the Commonwealth, empowering Judges of Probate to appoint guardians to minors and others.

Statute Provisions.

The Judge of Probate in each county, whenever there shall be occasion, is empowered to allow of guardians, chosen by minors of fourteen years of age

and upwards, and to appoint guardians for such as are under that age; taking sufficient security for the faithful discharge of their trust, and for accounting with the Judge or minor, on his arriving at full age; or at such other time, as the Judge, on complaint made to him, may direct.

When a minor above the age of fourteen years is cited to choose a guardian, and neglects to appear; or, appearing, refuses to choose, or chooses one who is unable to give sufficient security, or who refuses the trust; or when such minor is without the Commonwealth; the Judge of Probate may proceed, as in the case of minors under the age of fourteen.

The choice of a guardian by a minor, living more than ten miles from the Judge's dwelling-house, may be certified to him by any Justice in the same county, or by the town-clerk, if no Justice dwells in the town; and, being so certified, it is equally valid as if made in the Judge's presence.*

The marriage of a *feme sole*, who is appointed, either by herself or jointly with others, guardian to a minor or other person, does not make the husband guardian in her right, but operates as a determination of her power and authority.†

The guardians of minors are now required to return into the probate office a true and perfect inventory of all the real estate, goods and chattels, rights and credits, belonging to their wards, within such time as the Judge of Probate shall order. And before any guardian shall transfer or draw from any loan

* Stat. 1783, c. 38. † Stat. 1808, c. 97.

office, bank, insurance office, or other corporation, any stock belonging to his ward, he shall obtain license so to do from the Judge of Probate; for neglect of which, he shall be removed from office, and forfeit his probate bond.

The guardian of any minor, having a right in reversion to any estate set off for dower, may, with the consent of the Judge of Probate, purchase from the tenant in dower, or her assigns, their interest in the same, for the benefit of such minor, and from his personal estate. And all monies, so applied, may be charged to the minor in account; and the rents and profits of the estate purchased shall be placed to his credit. It must, however, be satisfactorily proved to the Judge that such purchase will be for the manifest advantage of the minor.*

Judicial Decisions.

If the guardian of a minor, being duly cited to settle his guardianship account, neglects to do it, his bond will be forfeited, although he is not indebted to his ward, but on the contrary, his ward is indebted to him.†

Guardians, appointed by our laws, are the mere agents of their ward; having an authority not coupled with an interest.‡

As an administrator cannot by his promise bind the estate of the intestate, so neither can a guardian by his contract bind the person or estate of his ward.

* Stat. 1817, c. 190. † iv. Mass. Rep. 106. ‡ vii. 6.

Although in his contract he states that he promises as guardian, yet he is personally bound.*

The father, as natural guardian of an infant, has no authority to make a lease of the infant's land.†

When a mortgage is made to an infant having a legal guardian, and the mortgager would redeem, it is proper to join the infant and the guardian in a bill brought for the purpose. The Court, however, will appoint him a guardian for the suit, who has no interest in the question to be settled. It is a general rule, that a guardian appointed by the Court should have no interest in the subject in controversy.‡

Course of Proceeding.

The former practice was to issue the letters of guardianship, upon a verbal application, without any order or decree in writing. The law did not require appraisers to be appointed.

Now the application, and the decreee thereon, are both made in writing. Appraisers are commissioned, and an order is passed upon the bond, pursuant to the late probate law.

The petition suggests that there is occasion for a guardian to be appointed; states the name, age and parentage of the minor, and that the petitioner has a right to take the guardianship.

When it is necessary that the next of kin to the minor should have notice of the proceedings, the petitioner should take care to have his application ac-

* vi. Mass. Rep. 59. † ii. 55. ‡ xii. 16

companied with their written consent to his appointment.

Minors may at any time, in or out of court, appear before the Judge, and signify their choice of a guardian. When this is not done by those entitled to choose, it should be remembered, that the certificate of choice, which the law requires as a substitute, is an indispensable prerequisite to appointing the guardian. It is sometimes omitted, through inadvertence or misapprehension, to the great inconvenience of the parties.

With blank forms of the bond and petition, from the probate office, the papers may all be previously prepared, and the business conducted before the Court by an agent or attorney, when this is most convenient, as in taking administration, or proving a will.

(a) It is a general rule, not to appoint the same person administrator, and also the guardian of a minor, who is heir to the estate, upon which he is to administer; the two trusts, being in their nature, incompatible. It is the province of such guardian, to inspect the proceedings of the administrator; to see that he conducts with fidelity, fairness, and punctuality, in making the inventory, collecting the effects and credits, and accounting before the Judge; and, if necessary, to cause him to be cited, pursuant to law, for this purpose. These duties of the guardian, it is evident, ought not to be imposed upon the administrator himself. (b)

In 1694, an act was passed by the provincial legislature for the relief of idiots and distracted persons, enjoining upon the selectmen or overseers of the several towns the duty of making the necessary provision for the support of such, as had no relations to do it, and authorizing the Court of General Sessions to order and dispose of their estate to the best improvement and advantage towards their support, at the discretion of the selectmen and overseers; and also empowering the Superior Court of Judicature to license the sale of their real estate for the same purpose. But, among other defects of this act, no method was prescribed for ascertaining the fact of their idiocy or distraction, nor any proper security provided for their estates; the selectmen or overseers having to perform the office of guardians, without the responsibility and obligations of such. These defects were remedied by an additional act, passed in 1736, establishing the provisions on this subject, which were revised by the statute providing for the appointment of guardians to minors and others.

Statute Provisions.

Whenever the friends or relations of an idiot, *non compos*, or lunatic person, or the overseers of the town, where he belongs, request it, the Judge of Probate shall direct the selectmen to make inquisition into his state of mind; and upon a certificate, under

the hands of a major part of them, that they adjudge him to be incapable to take care of himself, the Judge may appoint a suitable guardian or guardians for him, empowering them to take care of his person and estate, both real and personal, and to make a true and perfect inventory of the same, to be returned and filed in the probate office.

It is made the duty of such guardians to improve frugally and without waste the estate of the *non compos* person, to apply the annual profits thereof to the comfortable support of him and his household or family; to settle his accounts, and, if necessary, to sue for and recover all just debts due to him; to manage, improve, or divide his real estate, in like manner as he himself might, in the full exercise of his rational faculties: and also to pay all his just debts, contracted while he was of sane mind, from his personal estate, and, if that be insufficient, from his real estate, being first authorized to sell the same according to law. And if the income of his personal and real estate be not sufficient for his support, the Supreme Judicial Court may license the sale of the whole or part of his real estate for the purpose, as occasion may require.

Upon his being restored to his reason, the residue of his estate is to be delivered to him; or, in case of his death, to his legal representatives.

Such guardians are required to give bonds, with sufficient sureties, for the faithful discharge of their trust; and especially for rendering a just and true account of their guardianship.

The children of lunatics may have guardians appointed for them, in the same manner, as if their parents were naturally dead.*

Judicial Decisions.

It is the duty of the Judge of Probate to give notice to a supposed *non compos*, previous to adjudging him such; that he may be heard on the question, upon which the whole process turns, whether *he is* insane.

The presumption of law is, that every man is of sound mind until the contrary appears; and it being possible that interested relatives may falsely suggest insanity, with a view to deprive the party of the power of disposing of his estate, this very possibility should be guarded against by personal notice to him, when practicable, that he may expose himself to the view of the Judge, and prove by his own conduct and actions the falsity of the charge.

We should think it advisable, at least, that whenever commissions shall issue from the Probate Court to the selectmen to take an inquisition, they should contain an order that notice be given to the party complained of, that he may appear before the selectmen. This would be conformable to the practice of the Court of Chancery in England. It is held there to be *the privilege* of the party, who is the object of a commission of lunacy, to be present at the execution: and in a case before the Lord Chancellor, he inclined

* Stat. 1783, c. 38.

to quash the inquisition, the commission not having been executed near the place of abode of the lunatic, and the order that he should have notice having been disobeyed. A hearing before the selectmen, however, may not be essential, although expedient; as the inquisition is not conclusive, and there is another opportunity to traverse it.

But whether notice by the commissioners is essential or not, we are clear that it ought to be given before the adjudication in the Probate Court; and that without it such adjudication is null and void. A notification, served and returned in the manner practised with civil processes, would be sufficient; the time ought to be prescribed by the Judge of Probate.*

Upon the question, whether a guardian shall be appointed to a person *non compos*, the Court will receive other evidence than what arises from an examination of the person himself.†

The appointment of a guardian over one, as *non compos*, is not warranted by evidence that the person is old, and has become less careful of his property.‡

The guardian of an insane person cannot make his ward liable to an action, as on his own contract, by any promise, which the guardian can make. Nor can he be sued in his capacity of guardian, so as to make the estate of his ward liable to be taken in execution; for the judgment is not against the goods and estate of the ward in his hands, but against himself. A creditor may sue the insane person, who shall be defended by

* xiv. Mass. Rep. 222. † xii. 505. ‡ xiii. 129.

his guardian, and in that case, judgment being against the insane person, it may be satisfied by his property.*

It is competent for one under guardianship, as *non compos*, to make application to the Judge of Probate to revoke the letters of guardianship; and he may appeal from a decree, denying his application, without giving bonds to prosecute the appeal.†

Course of Proceeding.

The former practice was, in granting guardianship of lunatics, &c. for the Judge of Probate, upon a written representation and request of the relations, friends or overseers, that a guardian be appointed to a supposed *non compos*, or lunatic person, to direct his warrant to the selectmen to make inquisition into his state of mind, without any decree in writing; and upon accepting the return of the selectmen that they found him incapable to take care of himself, to issue letters of guardianship, and commission appraisers, without previous notice to him of the proceedings.

The present practice is, to pass a decree upon the representation and request, and, if this be for further proceedings, to issue the requisite warrant pursuant to it; and, upon the return of the selectmen, finding the party incapable, to issue an order of notice to him of the proceedings thus far, to be served upon him personally, fourteen days, at least, before the time assigned for a hearing, that he may shew cause why he should not be adjudged *non compos*, and liable to be put under

* v. Mass. Rep. 301. † i. 543

guardianship. After a hearing, at the time and place assigned, the decree thereupon is made in writing. If the party is adjudged to be liable to guardianship, such suitable person, as makes application for the trust, accompanied, with the consent in writing of the next of kin, if any, or of the friends or overseers, is appointed guardian. The case, at this stage of the proceedings, is analogous to that of granting administration; and an order for giving notice and other papers, usual in the latter case, are issued together with the letters of guardianship.

The observations, before made, in reference to administrators, as to the bond, sureties, appraisers, and agency, are alike applicable here.

GUARDIANSHIP OF SPENDTHRIFTS.

The colony laws were very early directed towards this class of offenders. In 1633, an order was made, that no person should spend his time idly, under pain of such punishment, as the Court might think proper to inflict: and the constables of every town were required to take notice of such offenders, especially "of common coasters, unprofitable fowlers, and tobacco-takers," and to present them to the next magistrate.

In 1682, it was ordered, that the tythingmen in each town should inspect such persons, as mispent their time and earnings, to the impoverishing of themselves and families, and return their names to the selectmen; they to report them to the next magistrates, who were empowered to issue warrants to the constable for the suitable employment of such persons, and

their earnings were to be laid out by the selectmen in necessaries for their families.

In 1736, the provincial legislature passed an act empowering the selectmen or overseers to take care of persons, who neglected the improvement of their estates, and lived idle, vagrant and dissolute lives; and to improve their estates to the best advantage, and apply the income to the support of them and their families. In 1756, the assent of two Justices *quorum unus* was made necessary to the exercise of this power by the selectmen. So the law seems to have remained till the present statute was passed, providing for the appointment of guardians.

Statute Provisions.

When any person, by excessive drinking, gaming, idleness, or debauchery of any kind, shall so spend, waste, or lessen his estate, as thereby to expose himself or family to want or suffering circumstances, or the town where he belongs, in the opinion of the selectmen thereof, to expense for the maintenance of him or his family, it is made the duty of such selectmen to exhibit a complaint against him to the Judge of Probate; who, after due notice given to the respondent, and such hearing, as the case may require, being satisfied that he comes within the purview of the statute, is authorized to appoint a guardian or guardians for him.

The guardians, so appointed, in the discharge of the duties of their trust, are to pursue the same method, and to be under similar obligations for faithful per-

formance, as the guardians of idiots, lunatics, and persons *non compos.**

When application is made for the appointment of a guardian, in such cases, and the Judge of Probate shall, by his decree, order notice to the person complained against, the complainants may file a copy of their complaint with the order of the Judge thereon, in the office of the Register of Deeds for the same county; and, in case a guardian shall be appointed for such person, any gift, bargain, sale, or transfer of real or personal estate made by him, after the filing of such copy with the Register of Deeds, shall be wholly void.†

Judicial Decisions.

Guardians of spendthrifts have no control of the persons of their wards. They cannot restrain them of their liberty, nor bind them in service.‡

An action will not lie against the guardian of a spendthrift, upon a contract made by his word; but the action must be brought against the ward, who may defend by his guardian.§

Course of Proceeding.

The statute directs the general course of proceeding in taking this sort of guardianship, and the present practice is much as it was formerly; except that, instead of a citation, an order of notice to the respondent is now issued, conformably to the statute

* Stat. 1783, c. 38.
† Stat. 1818, c. 60.
‡ v. Mass. Rep. 427.
§ iv. 436.

last above cited; and, after the hearing is had, the decree upon the complaint, adjudging him to be liable, or not liable, to guardianship, is made in writing and recorded.

The proceedings upon the complaint of the selectmen, in this case, are similar to those stated in the preceding case, after the return of the inquisition finding one *non compos*. Notice is given in the same manner, and the like papers are issued to the guardian. But it must appear that the spendthrift, although adjudged liable to guardianship, has consented to the appointment of the person, who applies for the trust, or has had notice of the application.

Care should be taken by the selectmen to have their complaint framed pursuant to the statute. It must distinctly state facts sufficient to bring the case within the purview of the law, and should contain all the general charges, intended to be alledged against the respondent, that he may have notice of them, and an opportunity to make his answer.

TRUSTEES OF THE ESTATES OF MINORS AND OTHERS.

The first statute, requiring trustees of the estates of minors and other persons to give bonds to the Judge of Probate, was enacted in 1811. Being found defective in various respects, it was revised by the probate law of 1818, which improved and much enlarged the provisions on this subject.

Statute Provisions.

Every person, constituted a trustee of any estate belonging to minors or others, devised in trust for

them by will, after the passing of the statute, except where the testator has otherwise directed, or where all those for whose benefit the trust is created, being of full age and legal capacity, have otherwise signified their request to the Judge, is required to give bonds to the Judge of Probate of the county, in which such will is proved, with sufficient sureties within the Commonwealth ; conditioned for the faithful execution of the trust according to the true intent of the testator; for making and returning, at such time as the Judge shall order, a true and perfect inventory of the real estate, goods and chattels, rights and credits, of such minors and others; for rendering yearly an account to the Judge of the annual income and profits thereof; and, at the expiration of the trust, adjusting and settling his accounts with the Judge, and paying and delivering over all sums of money, and other property, that may be due; and giving possession of all the estate, belonging to such minors or others, with which he may have been entrusted.

If a trustee neglect or refuse to give such bond, he is to be considered as having declined the trust; and the trustee, appointed in his place by the Judge of Probate, is authorized to demand of him all such estate, as may have come to his hands by virtue of the trust, and to manage, pay and deliver it over to such minors or others, in the same manner, and under the same obligations, as guardians.

Any trustee, appointed either by the testator or by the Judge of Probate, may be permitted, on request in writing, to resign the trust, when it clearly

appears to the Judge to be expedient and proper; first paying and delivering over the estate in his hands to the person, appointed trustee in his stead.

When any trustee appointed by will declines the trust, or dies before or after accepting it, and there is no provision in the will for perpetuating the trust, the Judge of Probate, after notice to those for whom the trust is created, may appoint some suitable person to be trustee in the place of the one so dying or declining.

The Judge of Probate has authority to remove trustees, in like manner as executors and administrators, when they become incapable or evidently unsuitable for the trust, after notice to them and the parties interested in the trust estate; and to substitute others. And every trustee, appointed in the place of a former one, who has been removed, or has deceased, or has declined or resigned the trust, must give bonds, and be under the same obligations, as an original trustee; except that it is within the discretion of the Judge, whether to require him to return an inventory or not.*

When it is made to appear to the Supreme Court of Probate, that it would be manifestly beneficial to any ward, or *cestui que* trust, to have a portion of the personal property in the hands of his guardian or trustee invested in real estate, or in any public fund, and no different provision is contained in the instrument, appointing such guardian or trustee, the Court, on petition of the guardian or trustee, or any person having interest in the property, may order it

* Stat. 1817, c. 190.

to be so invested, under proper restrictions, notice being first given, as in case of petitions for partition of real estate.*

Course of Proceeding.

The manner of performing the various duties, resulting to the Probate Court from these provisions of the law, is plainly indicated in the statute, although not particularly prescribed. When there is occasion for applying to the Judge to interpose his authority, pursuant to these provisions, application is to be made to him in writing, and his decree thereon is of course made in like manner.

A trustee by will, intending to accept the trust and enter into bonds, signifies it in writing to the Judge of Probate, stating his appointment, and the amount of property expected to come into his hands, and offering his bond with sureties. This being accepted and approved, the case resembles that of an executor after probate of a will and giving bonds; and accordingly letters of trust with a copy of the will annexed, or such parts as relate to the trust, and containing the general rules of law on the subject, are issued to the trustee, together with the warrant for appraising the trust estate. No order for giving notice of the trustee's appointment is required.

If a trustee wishes to decline, or having accepted, to resign the trust, he signifies his request in writing to the Judge of Probate: so also, when any party

* Stat. 1820, c. 54.

applies for the removal of a trustee, or for the appointment of one by the Judge, the application is made in writing, exhibiting the facts necessary to be considered by the Court, or proper to be notified to other parties in interest. Any order of notice, which may be required, is made as in other similar cases; personal notice, when practicable, is to be given, fourteen days, at least, before the time assigned for a hearing. A trustee, appointed by the Judge of Probate, having given acceptable bonds, is furnished with letters of trust, in like manner as an original trustee.

APPLICATIONS AT THE TIME OF RETURNING AN INVENTORY.

Having thus given a view of the proceedings on the appointment of administrators, executors, guardians, and trustees, it now follows to consider the various applications, which are usually made to the Probate Court, in discharging their respective duties; and more especially such, as are proper in the course of settling an intestate estate; as these will also include such, as are most necessary for executors, guardians, or trustees.

First in order are those applications, which may be made to the Court by any party, at the time of returning an inventory by the administrator.

Returning the inventory is the first occasion, which an administrator has, after his appointment, of applying to the Probate Court, and if he has been successfully diligent, the affidavit of notice; order for the

sale of personal estate; allowance to the widow; assignment of dower; list of debts; representation of insolvency; license for the sale of real estate; certificate preparatory to a license, when more than is necessary for the payment of debts is to be sold; or such of these, as the circumstances of the estate require, may be attended to at the same time, that the inventory is exhibited.

RETURN OF THE INVENTORY.

It has been seen, that as early as 1639, provision was made for recording all inventories; and executors and administrators have always been strictly required to make and return them into Court, though, anciently, the manner of doing this was not precisely regulated. The appraisers were not required to be commissioned and sworn; nor does it appear by the records, that the inventory was uniformly exhibited under oath. It was frequently brought in at the time of proving the will, or taking administration; and when this was not the case, the executor or administrator, sometimes on such occasions, promised upon oath to do it, within a certain time. In 1719, it was enacted that the appraisers should be commissioned and sworn for the due performance of the service assigned them.

Both the colonial and provincial laws contained severe penalties for neglecting the duty of returning inventories; and in 1738, it was further enacted, that every executor, who neglected to give in a full and true inventory of the estate of the deceased, after being served with a citation for the purpose,

should be chargeable with all the debts and legacies, and, in addition to the penalty before provided, should forfeit one hundred pounds for every month's neglect, recoverable by any residuary legatee.

Statute Provisions.

By the act for regulating proceedings on probate bonds in the Courts of common law, when it shall appear that the administrator has received the personal property of an intestate, and has not exhibited upon oath, a particular inventory thereof, execution shall be awarded against him for the whole penalty of his administration bond, to be distributed among the parties interested, agreeably to the directions of law.

The like judgment and proceedings, so far as they can with propriety take place, are to be had upon bonds of executors, guardians, and others, given to the Judge of Probate.*

It is now provided, in such cases, so far as respects an administrator, that execution shall be awarded against him for such a part of the penalty of his administration bond, as the Supreme Court of Probate shall, on a full consideration of all the circumstances of the case, judge reasonable.†

Judicial Decisions.

As soon as a debtor is appointed administrator, if he acknowledges the debt, he has actually received so much money, and is answerable for it. This is

* Stat. 1786, c. 55. † Stat. 1816, c. 94.

the result with respect to an executor: and the same reason applies to an administrator. The consequence is, that he and his sureties in the administration bond are liable for the amount of such a debt, in like manner as if he had received it from any other debtor of the deceased.

An administrator, being a debtor to the intestate, will insert his debt in the inventory and bring it into his account to the credit of the intestate's estate.*

Course of Proceeding.

The mode of returning and receiving an inventory is the same now as formerly, except that formerly a certificate of the oath only was written, whereas now the decree, accepting and allowing the inventory, is also made in writing.

The appraisers, having been sworn, and had certificate of the fact entered upon their warrant, and having completed, signed, and delivered the inventory to the administrator; he, being satisfied that it is such an inventory, as the law requires him to make, also signs it, and then exhibits, and makes oath to the truth of it, before the Court.

In making the inventory, the party will remember, that his obligation is to exhibit "a true and perfect inventory of all and singular the real estate, goods and chattels, rights and credits, which have come to his hands, possession or knowledge;" and, of course, he will not fail to shew all such estate to the appra-

* xi. Mass. Rep. 269.

sers; or, when this is impracticable, to afford them the requisite information for truly estimating it.

It is important to have the contents of the inventory so arranged, as to present each class of property by itself; that the whole amount of each may be distinctly seen, as well as the particulars of which it is composed: For example, the several parcels of real estate placed in succession together; so the goods and chattels; so the stocks or public securities of any kind; so the notes, bonds, and judgments; so the book-debts, &c. adding the particulars, and shewing the amount of each class separately.

Parties interested in the estate should have notice of the time for returning the inventory, as well as of every other important proceeding, in settling the estate; that they may be seasonably prepared for judging as to the expediency of an order to sell the personal estate, or as to any other applications to the Court, upon the return of the inventory.

AFFIDAVIT OF NOTICE.

Statute Provisions.

An affidavit of the executor or administrator, made and filed in the Probate Court, within seven months after undertaking his trust, accompanied with an original notification, or a copy of it, and recorded in the probate office, shall be evidence of the time, place and manner, that notice of his appointment was given.

No executor or administrator, who has thus given notice of his appointment, and perpetuated the evidence thereof, shall be held to answer to the suit of any creditor of his testator or intestate, unless the same is commenced against him, within the term of four years from the time of his giving bonds for the faithful discharge of his trust; except when the right of action does not accrue till after the four years, and for such cases special provision is made.*

Judicial Decisions.

An executor or administrator, who has given notice of his appointment pursuant to the statute, cannot waive the bar thence arising; as he may the general statute of limitations: because it is provided not for his benefit alone, but for that of heirs and devisees also; in order to discharge their estates, within a reasonable time, from the lien for debts of the deceased.†

Course of Proceeding.

Formerly, as it was not common to issue an order upon the administrator to give notice of his appointment, there was usually no affidavit of such notice filed and recorded in the probate office. Now both are done.

The order directs the manner of giving the notice, and is accompanied with suitable blanks for the purpose, and also for making and returning the affidavit.

* Stat. 1788, c. 66. and Stat. 1791, c. 28. † xvi. Mass. Rep. 429.

The administrator, having given notice as directed, prepares his affidavit accordingly; and having brought it into Court, and made oath to it before the Judge, it is thereupon ordered to be filed and recorded.

ORDER FOR THE SALE OF PERSONAL ESTATE.

In 1703, it was enacted, that every executor or administrator should pay the debts and legacies of his testator or intestate in specie, if he had such as assets; if not, that he should expose the estate to the creditor or legatee, to receive payment therefrom, according to an estimation by appraisers indifferently chosen: and also, that when execution was awarded against an executor or administrator, who had not assets in money to meet it, the sheriff should levy the goods or estate of the deceased, and sell sufficient to satisfy the execution, unless the creditor or legatee accepted the estate, at its value in money, estimated by appraisers.

In 1784, the Judge of Probate was authorized to order the sale of the personal estate of an intestate, when it appeared for the benefit of all concerned; and the same provisions were revised, with some limitations, by the probate law of 1818.

Statute Provisions.

Every administrator is held to account with the Judge of Probate for the personal estate of the deceased, as the same is appraised, unless the Judge thinks it will be more for the benefit of the parties interested, otherwise to dispose of it; in which case he

shall order the whole, or any part of it, to be sold at public auction or private sale, in such manner as he shall determine to be best; and the administrator shall account for the same as sold.

Such sale is to be ordered within three months from the return of the inventory, and not afterwards; unless, for special reasons, the Judge of Probate shall allow a further term, not exceeding six months.

Course of Proceeding.

Formerly, in this case, there were no written proceedings; and, of course, nothing was left on the files or records of the Probate Court, respecting the sale of personal estate by an administrator.

At present, the application of the administrator, or other person interested, who desires the sale to be ordered, is made in writing; as are also the decree thereon, and the warrant directing the manner of conducting the sale. The application states the reasons for the sale, and, if a private sale is requested, the circumstances, which render this proper. A particular account of sales is returned into Court by the administrator, at the time of settling his account of administration.

Generally, the administrator and the heirs can be prepared to decide, at the time of returning the inventory, whether to apply for an order to sell the personal estate; but if, from the peculiar situation of any estate, there are reasons for delaying the application, more than three months beyond this time, such reasons are to be stated in writing to the Court, that

an allowance of further time may be decreed, pursuant to the statute.

ALLOWANCE TO THE WIDOW.

In 1710, it was enacted, that Judges of Probate, in making up and passing accounts of administration, should make allowance of necessary bedding, utensils, and implements of household, to the use of the wife and family of the deceased, when provision in this respect was not made by will; the same not to be considered assets in the hands of the executor or administrator, although the estate should prove insolvent, as such necessaries could never have been levied or distrained for debt.

The statute of distributions, passed in 1784, provided that, when the personal estate was insufficient to pay the debts of the deceased, the widow should nevertheless be entitled to her apparel, and such other of the personal estate, as the Judge of Probate should determine necessary, according to her quality and degree. In 1803, an additional act was passed, entitling the widow to the same consideration, when the estate was sufficient to pay the debts, with but little surplus left. And upon the last revision of the statute of distributions, provision was made for the widow's allowance, without any such limitation.

Statute Provisions.

The widow of an intestate is entitled to the allowance of her wearing apparel, according to the quality and estate of her husband, and such further necessa-

ries as the Judge of Probate shall order, regard being had to the state of the family under her care.*

In the settlement of insolvent estates, whether testate or intestate, the widow is entitled to her apparel, and such other of the personal estate as the Judge of Probate shall determine necessary, according to her quality and degree; and when such allowance has been made from an intestate estate, represented insolvent, but which ultimately appears otherwise, the Judge of Probate is authorized, by a subsequent decree, to make her a further allowance.†

Judicial Decisions.

The Judge of Probate may allow to the widow of an intestate the whole of the personal estate, unless the amount be so great, as to make the allowance extravagant.‡

Course of Proceeding.

Formerly the application to the Judge of Probate for the widow's allowance, and his decree or determination thereon, and the order or directions to the administrator were wholly verbal, and no trace of the proceedings was left upon the files or records of the probate office.

Now the application is made in writing, signed by the widow, or some agent in her behalf, representing the state of the family under her care, and such other circumstances, as require consideration in making the

* Stat. 1805, c. 90. † Stat. 1816, c. 95. ‡ xv. Mass. Rep. 183.

allowance. A decree is passed, and if it be in favour of the petition, and no appeal is claimed, a warrant immediately issues, directing the administrator to deliver the amount to the widow accordingly. When she is administratrix, the warrant of course authorizes her to retain such amount to her own use.

It is always proper to give the heirs notice of the time of presenting the petition for the widow's allowance, that they may have opportunity to be heard on the subject.

ASSIGNMENT OF DOWER.

Under the colonial government, as has been seen, the County Courts had power to assign to the widow and heirs of an intestate their several parts of his real estate. By the provincial statute of distributions, the Judges of Probate succeeded to this authority, and were empowered to order and make a just distribution of an intestate's real and personal estate; one third part of the personal estate to the widow forever, besides her dower or thirds in the houses and land during life, and the residue among the heirs. The statute of distributions, passed in March, 1784, contains similar provisions.

Statute Provisions.

The statutes above mentioned have always been construed to give to the Judges of Probate the power of assigning dower, although the exercise of such power has never been regulated by the legislature.

The widow may, in all cases, waive the provision

made for her in the will of her deceased husband, and claim dower, and have it assigned to her, in the same manner, as if he had died intestate.*

The widow of any citizen of the United States, who was an alien at the time of her intermarriage, is entitled to dower in her husband's estate.†

Every widow, having right of dower in any estate, is entitled to receive one third part of the rents, incomes, and profits of such estate, until her dower has been set out to her by the heirs, according to law, or actually assigned to her under a judgment of Court, or an order of a Court of Probate.‡

Judicial Decisions.

The assignment of dower is not, at common law, within the jurisdiction of the ordinary; or, in any respect, an incident to the administration of the estates of deceased persons. The exercise of this authority by Judges of Probate seems to be the result of certain provisions of the statute law of this Commonwealth, respecting the distribution of the estates of intestates, extending to real as well as personal estates. And when restricted to the lands and tenements, of which the intestate died seized, and to a partition between the widow and descendants, or the widow and collateral heirs of the intestate, and to cases where no contest is suggested, the process for the purpose is both economical and convenient. But in contested cases, and especially when the intestate was not, at his

* Stat. 1783, c. 24. † Stat. 1812, c. 93. ‡ Stat. 1816, c. 84.

death, the tenant of the fee; where his heirs have no interest or concern in the assignment of dower; and where strangers, not presumed to be connusant of the proceedings in the Probate Court, have the whole interest and property, subject to the claim of dower; a writ of dower is the suitable and only adequate remedy, after a demand made, and a refusal to assign.

Consequently, where the estate has been conveyed in fee and in mortgage by the husband in his life time, there can be no partition among his heirs, nor any effectual assignment of dower to the widow, against the consent of the mortgagee, by any process instituted in the Probate Court,*

In the appointment of commissioners to assign dower, the Judge of Probate is not confined to freeholders of the county, where her husband last dwelt.†

In the assignment of dower, commissioners are to regard the rents and profits only of the several parcels of the estate, out of which the dower is to be assigned. When they have ascertained the annual income of the whole estate, they ought to set off to the widow such a part, as will yield her one third part of such income, in parcels best calculated for the convenience of herself and of the heirs. This rule is adapted equally to protect widows from having an unproductive part of estates assigned to them, and to guard heirs from being left, during the life of the widow, without the means of support.‡

It is well understood by the common law, and the principle has been repeatedly settled in this Court,

* ix. Mass. Rep. 9. † xii. 454. ‡ iv. 533.

that the dower of the widow is not to be assigned so as to give her one third of the land in quantity, but so that she may enjoy one third of the rents and profits or income of the estate. Now of a lot of wild land, not connected with a cultivated farm, there are no rents and profits. The rule, therefore, by which dower is to be assigned, cannot be applied to such property.

A widow is not dowable of land in a wild and uncultivated state.*

Course of Proceeding.

Formerly, the warrant for assignment of dower was issued upon a verbal application, without a decree in writing, and no evidence of the transaction existed in the probate office, until after the commissioners made their return.

Now the petition, and the decree of the Court thereon are made in writing; if the decree is for assigning dower, and no appeal is claimed, commissioners are then appointed accordingly.

The petition is signed by the widow, her agent or attorney, and concisely states the facts, which bring the case within the jurisdiction of the Probate Court. Notice should be given to the heirs of the time for presenting such petition, unless they have signified their assent to it, or agreed upon the persons to be appointed commissioners.

The warrant directs the commissioners to give due notice of their proceedings to all parties interested; who are also to have notice of the time when the re-

* xv. Mass. Rep. 164.

turn of such proceedings is made to the Court. The assent of the widow and heirs to the acceptance of the return is usually expressed in writing; when this is not done, opportunity must be afforded for offering any objections, that may exist.

If the estate, in which dower is claimed, be subject to mortgage, the consent of the mortgagee, in writing, is essential to any proceedings in the Probate Court for the assignment of dower.

LIST OF DEBTS.

In order to shew the necessity of selling real estate for the payment of debts, it often becomes proper for the administrator to exhibit to the Probate Court as complete a list, as he can, of the claims against the estate. The manner of proceeding in such case is the same now, as formerly; except that formerly the certificate of the oath only was written, but now the decree accepting and ordering the list of debts to be recorded. is also made in writing.

Having collected all the demands, which have come to his knowledge, and which he believes to be real, the administrator prepares a particular list or schedule of them, stating each creditor's name, and the amount of his demand, adding the widow's allowance, if any, and also the expenses of setling the estate, then signs his name, and makes oath to it before the Court.

INSOLVENT ESTATES.

The provisions of the colonial ordinance, made in 1677, for the distribution of the insolvent estates of

deceased persons, were re-enacted by the provincial legislature in 1696; and were again revised and enlarged by the existing statute on this subject, passed in 1784.

Statute Provisions.

When the estate is insufficient to pay all the just debts, which the deceased owed, the executor or administrator, before paying any, except debts due for all rates and taxes, and debts due to the Commonwealth, and for the last sickness and necessary funeral expenses of the deceased, shall represent the condition and circumstances of the estate to the Judge of Probate; who shall appoint two or more fit persons to be commissioners, with full power to receive and examine all claims of the several creditors. Such commissioners shall cause the times and places of their meeting for this purpose to be made known, by posting notifications thereof in some public place in the shire town of the county, where the deceased last dwelt, and of the two next counties; or by advertising the same in such public newspaper or papers, as the Judge may direct. Six months, and such further time, not exceeding eighteen months, as the circumstances of any estate may require, shall be allowed by the Judge to the creditors for bringing in and proving their claims. At the end of the time limited, the commissioners shall make their report, and present to the Judge upon oath a list of all the claims laid before them, with the sums allowed by them on each claim: and the Judge shall order

them meet recompense out of the estate for their services.

The debts, before mentioned being first deducted, the Judge shall order the residue of the estate both real and personal, the real estate being sold according to law, to be distributed among the creditors, who have made out their claims before the commissioners, in proportion to the sums respectively due to them. The reversion of the widow's dower, if any, may be sold by order of the Judge, on application therefor, and distributed with the rest of the estate: when this is not done, it shall be sold at the expiration of her term, and the proceeds distributed in like proportion.

Any creditor, whose claim is wholly or in part rejected, may have it determined at common law; provided he gives notice thereof in writing, at the probate office, within twenty days after the report is made, and prosecutes his action as soon as may be; and if the executor or administrator is dissatisfied with the allowance of any claim, and gives notice thereof at the probate office, and also to the creditor within the term of twenty days, such claim shall be struck from the commissioners' report, unless the creditor shall speedily prosecute it at common law, or agree with the executor or administrator before the Judge to submit it to reference.*

The commissioners, whenever it is judged expedient by a majority of them, may administer an oath to any creditor, who lays his claim before them, to

* Stat. 1784, c. 2.

make true answers to such questions, as they may ask relative to it.*

If the executor or administrator neglects to settle his account of administration, within six months after the commissioners have made their report, or within such further time, as the Judge of Probate under his hand and seal may think proper to allow, any creditor may commence, and prosecute to final judgment, an action for the recovery of his demand, in the same manner, as if the estate had not been represented insolvent.†

Judicial Decisions.

The executor or administrator has a year, after he has taken upon himself the trust, to ascertain the probability of the insolvency of the deceased. He will ascertain, as well as he can, the amount of the debts, which he will compare with the effects, of which he has knowledge, and then form his opinion. If he believes the estate to be insolvent, he will represent these facts to the Judge; and if the Judge shall allow the representation, and award a commission of insolvency, the estate is then *apparently* insolvent; and the law will not permit any of the effects to be taken from the executor or administrator by legal process, to satisfy the demand of any creditor; but a demand may be settled by legal process, so far that it may be evidence of the amount of the claim. If, on the return of the commission, and the settlement

* Stat. 1789, c. 50. † Stat. 1794, c. 5.

of the administration account, the Judge shall decree a distribution of the effects, then there is legal evidence of an *absolute* insolvency, and not before: For the insolvency may depend on a claim allowed by the commissioners, which may be disputed by the executor or administrator, and defeated by a trial at law. Upon an absolute insolvency, the executor or administrator must administer the effects pursuant to the decree.*

The heirs of one deceased insolvent are entitled to the rents and profits of his real estate, until it is sold for the payment of his debts; or, if it were mortgaged, until entry by the mortgagee. For the real estate descends by law to the heirs, and they accordingly may enter immediately; and may remain rightfully in possession, until the administrator, in behalf of the creditors, shall sell it pursuant to license obtained for the purpose.†

If a creditor to an insolvent estate has a mortgage, as security for his debt, of less value than the amount of the debt, he can claim from the commissioners only for the difference between his debt and the value of the property mortgaged.‡

All mutual demands, subsisting between the insolvent and his creditors, at the time of his death, are to be liquidated and balanced. If the balance be against the estate, it must be laid before the commissioners, and be by them reported to the Judge; but if the balance be against the creditor, it is not a sub-

* iv. Mass. Rep. 620. † xvi. 289. ‡ xvi. 308.

ject of the report; which is to include only claims against the estate.*

The commissioners should cast interest on all claims allowed by them, from the death of the insolvent debtor to the time of making their report; whether they expressly bear interest or not.†

Neither the Judge of Probate, nor the Supreme Court of Probate on appeal, can examine the merits of a claim against an insolvent estate reported by the commissioners; but the statute remedy alone must be pursued.‡

If the administrator is guilty of neglect or corruption in not opposing the admission of illegal claims by the commissioners, he may be liable to an action on his administration bond, or to a special action of the case for waste.§

The commissioners have no authority to receive and examine the claims of the executor or administrator against the deceased; as such claims are to be determined by the Judge of Probate, or by referees appointed by him pursuant to the statute.¶

Course of Proceeding.

The representation of insolvency was formerly, as at present, made in writing, but was expressed in general terms only, and the particulars stated to the Judge verbally.

It now contains these particulars, to wit, the amount of debts and charges against the estate, so far as they

* ii. Mass. Rep. 499. † xiii. 537. ‡ i. 23. § ii. 89.
¶ Hall v. Hall, 1801.

are ascertained or rendered probable, with the value of the personal estate, and also of the real estate, shewing the deficiency of the estate to meet the debts and charges.

If the representation is accepted, commissioners are appointed accordingly; in most cases, two only. Their commission contains directions, as to the time allowed for bringing in claims, and the manner of giving notice to the creditors for this purpose. If further time than is at first allowed be found to be necessary, the reasons for extending the time are stated in a written application to the Judge; who thereupon decrees and directs, as the case may require.

The form of the commissioners' report is sufficiently indicated by the statute, as well as the manner of giving notice at the probate office, by any party dissatisfied with it. It should contain all the claims laid before the commissioners, even those wholly disallowed by them.

The report being returned and accepted by the Judge, the executor or administrator is directed to pay the commissioners, and the report is ordered to be on file in the probate office; and having remained on file twenty days, without notice given of any objection to it, and the account of administration being duly settled, the order of distribution is issued.

If, from the peculiar circumstances of any estate, it is impracticable to settle the account of administration within six months from the return of the report; these circumstances must be distinctly stated in a petition to the Judge for such further time, as may be

necessary ; which he is authorised, under his hand and seal, to allow.

LICENSE FOR THE SALE OF REAL ESTATE.

By the probate law of 1818, the Courts of Probate have concurrent jurisdiction with the courts of common law, to license the sale of real estate for the payment of debts.

Statute Provisions.

All the lands, tenements and hereditaments, of which the intestate died seized; and also all estate, which he had fraudulently conveyed, or of which he had been colourably or fraudulently disseized, with intent to defraud his creditors, shall be liable for the payment of his debts, whenever the personal estate shall be insufficient; saving to the widow her dower, except in the estate so fraudulently conveyed, to which she had legally relinquished her right of dower.*

The Probate Court, upon petition, may empower and license any executor, administrator, or guardian, to sell the real estate of his testator, intestate, or ward, for the payment of debts. Such authority extends as well to estate held by the testator or intestate in mortgage, of which the executor or administrator has recovered possession, or to estate set off on execution to the executor or administrator for the use of the devisees or heirs, as to other real estate.

Personal notice, or notice by advertisement, for three

* Stat. 1805, c. 90.

weeks successively, in such newspaper as the Court may order, to all persons interested therein, of the time and place at which they may be heard on the subject, is first required; and if any of the persons interested shall give bond with sufficient sureties, to pay the debts and legacies with incidental charges, the license shall not be granted.

No such license continues in force for a longer term than one year from the time of granting it. The executor, administrator, guardian or other person, who is empowered to make the sale, is first to give bonds and take the oath prescribed by law. They may adjourn such sale, if expedient, for any space of time, not exceeding fourteen days.*

The Probate Court has also authority to license executors and administrators to sell real estate for the payment of the charges of administration.†

The guardian of a spendthrift, on petition for license to sell his ward's real estate for payment of debts, must produce to the Court a certificate under the hands of the overseers of the poor of the town, where the spendthrift belongs, "purporting their consent and approbation to the sale of such a proportion of the real estate of such person, as such overseers shall be satisfied is just and equitable to discharge the *bona fide* debts of such person, excluding all debts contracted by gaming."‡

The Supreme Judicial Court, and Court of Common Pleas, may license executors, administrators and guardians, to sell the real estate of persons deceased, or of

* Stat. 1817, c. 190. † Stat. 1818, c. 112. ‡ Stat. 1806, c. 103.

wards, situate within the Commonwealth, in cases where the deceased did live, and the wards do live, without the Commonwealth, as in other cases. And all proceedings, necessary to be had before any Judge of Probate respecting such sale, shall be had before the Judge of the county, where the estate is situated.

Whenever any executor, administrator or guardian, duly appointed in any other state, shall file, in any probate office in this Commonwealth, a certified copy of his appointment, he shall be entitled to all the rights and powers incident to such appointment, as far as respects the sale of real estate. And any bond, required by law previous to such sale, may be given to and approved by the Court, which proved the will, or granted the administration or the guardianship, and a certified copy of such bond so approved, filed with the Judge of Probate in this Commonwealth, shall be sufficient.*

The affidavit of any executor, administrator, guardian or other person, licensed to sell real estate, or of any person employed by any of them, duly taken, within eighteen months next following the sale, and filed in the Probate Court and recorded, together with one of the original advertisements of the time, place, and estate to be sold, or a copy of such advertisement, shall be evidence of the time, place, and manner notice was given.†

Judicial Decisions.

The lands of any intestate being liable to the pay-

* Stat. 1817, c. 182. † Stat. 1788, c. 66.

ment of his debts, the administrator may lawfully sell them on license, whether they are in the possession of the heir, or of his alienee, or disseizor. For no seizin of the heir, or of his alienee, or of his disseizor, can defeat the naked authority of the administrator to sell on license.*

All the personal estate of a testator, and all the real estate of which he died seized, whether devised or not, are assets for the payment of all his debts, whether due by simple contract or by specialty.

Upon an application for license to sell real estate for the payment of debts, the Court may direct the sale of any specific part of the estate. In granting such licence to an executor, the Court will marshal the assets according to the following rule: 1. The personal estate, excepting specific bequests, or such of it, as is exempted from the payment of debts. 2. The real estate, which is appropriated in the will as a fund for the payment. 3. The descended estate, whether the testator was seized of it, when the will was made, or it was afterwards acquired. 4. The lands specifically devised, although they may be generally charged with the payment of debts, but not specially appropriated for that purpose.†

An administrator may sell land holden by his intestate under a lease for 999 years, as personal property, without obtaining license for it, as in the case of selling real estate for the payment of debts.‡

(a) An administrator, acting under a license to sell the real estate of his intestate, is not required by any du-

* iv. Mass. Rep. 359. † vi. 149. ‡ v. 419.

ty of his office or trust to enter into a personal covenant for the absolute perfection of the title, which he undertakes to convey; or for the validity of the conveyance beyond his own acts. He is, however, at liberty to do it, if he chooses thus to excite the confidence of purchasers, and to enlarge the proceeds of the sale; and he may engage his own credit collaterally in the conveyance.

Such covenant, although expressed to be made in his capacity of administrator, is necessarily a personal covenant, for which he is liable of his own goods; because the effects of the intestate are not liable to the contract of an administrator, as such, and because an express contract of that kind by an administrator can have no other legal operation.* (c)

Course of Proceeding.

Formerly, the Probate Court had no power to grant license for the sale of real estate.

The petition for the license states what is the amount of debts more than all the personal estate, accompanied by a certificate of the Register of Probate shewing the fact. A time is assigned by the Court for considering the subject of the petition, and notice ordered pursuant to the statute, unless the consent in writing of all persons interested is produced. At the time assigned, a decree is passed upon the petition, and, if granted, the order or license is issued accordingly; which contains the general directions of the law, for conducting the sale. A return of the

* vii. Mass. Rep. 201.

proceedings under the license is to be made to the Probate Court, to be filed with the account on settlement, exhibiting a schedule or particular list of the parcels of estate sold, to whom and at what price, certified by the auctioneer.

CERTIFICATE PREPARATORY TO THE SALE OF REAL ESTATE.

The Probate Court has no authority to license the sale of real estate, but for the payment of debts, legacies, and charges of administration; and when it is necessary to sell more than for this purpose, or when the object of the sale is to place the proceeds at interest, application must be made to the Courts of common law, accompanied by a certificate from the Judge of Probate. This certificate is made a necessary prerequisite to the granting of the license by those Courts, and cannot be viewed as a mere matter of form. It sometimes involves much responsibility, especially when it is to sanction the conversion of the real estate of minors or others into money. Interested motives may prompt to the application for license to sell in such cases, rather than views of benefit to those concerned in the estate; and it is the duty of the Judge of Probate to withhold his certificate, until he is satisfied that the permanent interest of these will be promoted by the sale.

Statute Provisions.

Whenever it is necessary that executors, administrators, or guardians, should be empowered to sell

any real estate for the payment of debts, &c. and by a partial sale the residue would be greatly injured, license may be granted by the Supreme Judicial Court or the Court of Common Pleas, to sell the whole, or so much as may be most for the benefit of the parties interested. The petition for such license must be accompanied with a certificate from the Judge of Probate of the county, where the estate was inventoried, certifying the value of the real estate, the value of the personal estate, and the amount of debts: "and also his opinion whether it be necessary that the whole or a part of the estate should be sold, or if part only, what part."

When the friends or guardians of minors or others petition the Supreme Judicial Court for license to sell real estate, belonging to such minors or others, for the purpose of putting out and securing the proceeds to them on interest, such license may be granted, provided "the Judge of Probate shall certify that the whole or a part of the said estate is, in his opinion, necessary to be sold, or if part only, what part."*

Course of Proceeding.

It was formerly the practice for the Judge of Probate to grant the certificate preparatory to a sale of real estate, upon a verbal representation and request, made to him either in or out of Court.

Now it is required of the party, applying for such certificate, to make a written representation to the

* Stat. 1783, c. 32.

Judge, at some Probate Court, describing in general terms the estate contemplated to be sold, with a reference for fuller description to the petition, prepared for the Court authorized to license the sale; and stating the facts, which appear to render the sale necessary, and from which the Judge can form his opinion on the subject. These facts must be corroborated by the affidavit of some disinterested persons, acquainted with the situation of the estate. A decree is passed, according as the opinion of the Judge may be from the facts proved; if satisfactory to the party, he takes such certificate as is granted; if not satisfactory, he has the right of appealing from the decree, as in other cases.

ACCOUNT OF ADMINISTRATION.

Having attended to the inventory, and such other of the applications and proceedings now considered, as the circumstances of the estate require; and having collected the debts due to the estate, and paid all just demands and charges against it; the administrator is prepared to settle his account with the Judge of Probate. And, at the same time, the order for a distribution of the personal estate, remaining in his hands, should be attended to; as may be also any petition of the heirs or others for a partition of the real estate, if they think proper to make such application.

The time for settling the account of administration is universally understood, being always expressed in the letters of administration issued, as well as in the bond, which is taken and filed in the probate office.

Within one year after accepting his trust, every administrator is directed and bound to render a just and true account of his administration upon oath. This term of time is considered by the law as amply sufficient, in ordinary cases, for settling the estate of a deceased person; and in most instances, perhaps, it is more than is actually needed.

The interest and safety of the administrator and his sureties, no less than of those concerned in the estate, are involved in a punctual discharge of his duties. Yet the negligence of executors and administrators has always been a subject of complaint; and sometimes of severe penalties. In 1752, an act was passed, subjecting executors, when cited to account at the instance of an heir, legatee or creditor, to the same penalty for neglecting it, as had before been provided for refusing, under similar circumstances, to return an inventory; which was one hundred pounds for every month's neglect.

The remedy is now upon the probate bond. Perhaps some additional provision, which, although milder in effect than such remedy, would operate more certainly, might be found useful. It is understood that the probate law of 1818, as it came from the learned committee who prepared the act, and as it passed one branch of the legislature, contained a clause empowering the Judge of Probate to hold executors and administrators, chargeable with twelve per cent. interest on the sums retained in their hands, for all such time as they should, in his judgment, needlessly delay the settlement of the account of administration. Some

such provision may yet deserve the attention of the legislature.*

Statute Provisions.

When the administrator shall refuse or neglect to account, upon oath, for such property of the intestate, as he has received, especially if he has been cited by the Probate Court for that purpose, execution shall

* That the time, which the law allows for settling the estates of deceased persons, is generally sufficient, and that adequate motives to diligence and punctuality in those, who administer upon them, are alone wanting to correct the evils of procrastination, may be proved from the experience of every assiduous and faithful administrator. Various examples of such experience might be found within the county of Essex ; one shall suffice to be mentioned here.

A gentleman of Newburyport, who has been much employed for the last ten or twelve years, as executor and administrator, and who is distinguished for the prompt and satisfactory manner, in which he discharges every trust he undertakes, has made from his own records a statement of the result of his experience. Of ninety-seven estates settled by him, being all of which he has kept a particular record, and comprising those of every degree of complexity, he closed the accounts of administration on all but thirty three within the year, and on all these but six, within two years. The average time of the whole was less than five months to each estate.

It may not be necessary, nor always practicable, for executors and administrators thus to preserve a record of their proceedings, for the inspection of all concerned; but if the example be so far followed, as to perform each duty in its proper time and order, and to give due notice of the proceedings to the parties interested, a like prompt and satisfactory settlement of estates can hardly fail to be the result.

be awarded against him, in a suit upon his probate bond, for the full value of the personal property of the deceased, that has come to his hands, without any discount, abatement or allowance for charges and expenses of administration, or debts paid.

The like judgment and proceedings, as far as they can with propriety take place, are to be had upon bonds of executors, guardians and others, given to the Judges of Probate.*

When the claim of an executor or administrator against his testator or intestate, being exhibited in writing to the Judge of Probate, is disputed by any person interested adversely in its allowance, it may be determined by referees, mutually agreed upon, under a submission made before the Probate Court in writing, signed by all the parties interested, or their agents duly authorized; or, if any of the parties are minors, by their guardians duly appointed: and the Court may decree according to the report of such referees, made to it in writing.

So also, when a dispute arises respecting the use and occupation of real estate by the executor or administrator, the Judge of Probate may appoint three disinterested persons to ascertain the value thereof; and their report, made in writing, after hearing the parties, and accepted by the Judge, shall be the sum the executor or administrator shall be charged with in his account.†

The executor or administrator of any deceased creditor, with the consent and approbation of the

* Stat. 1786, c. 55. † Stat. 1789, c. 11.

Judge of Probate, may join other creditors in discharging any debtor, who is unable to pay all his debts, upon receiving the just portion of his property, to which the deceased creditor would have been entitled.

In every case, where the oath of an executor, administrator or guardian, who is unable by reason of sickness, bodily infirmity, or otherwise, to attend the Probate Court, is required to be made personally before the Judge to any account; the Judge, by commission of *dedimus potestatem*, may authorize any disinterested Justice to administer such oath, who shall return a certificate thereof, with the commission, and also the account and vouchers.*

Judicial Decisions.

The statute provision for appointing referees in the Probate Court, to ascertain what the executor or administrator ought to credit in his account for the use and occupation of real estate, does not recognise the right of executors and administrators to have the rents of the real estate for the use of creditors; but provides for the case, where they happen to be occupants, by prescribing the mode, in which they ought to account, for the use of those to whom the same may belong.†

At law the lands descend to the heir, subject to the payment of debts, if there be a deficiency of personal assets. The administrator frequently enters on the lands, and accounts for the rents and profits in

* Stat. 1817, c. 190. † xvi. Mass Rep. 287.

the Probate Court; and this practice may not be inconvenient to the heirs. For the profits become a part of the fund, if wanted, for the payment of the debts; and, if not wanted, they form a part of the distributive shares of the personal estate. But in law the administrator has no right to enter into lands, or to take the profits. He has no interest in them, but a naked authority to sell them on license to pay the debts, when the personal estate is insufficient.*

If a debtor be appointed the executor or administrator of his creditor, the debt is not thereby extinguished, but he shall be considered as having paid it, and as holding the amount in his hands, to be accounted for in like manner, as if received from any other debtor.†

The Probate Court, in adjusting the account of an executor or administrator, is competent, having satisfactory evidence before it, to require an allowance of assets, not inventoried or credited.‡

Charges in an account of administration for the payment of taxes must be proved by receipts from the collector.§

An administrator will not be allowed any charges in his account for the support and education of an infant child and heir of his intestate.‖

Nor will he be allowed interest on monies, advanced by him on account of the estate of his intestate; it being no part of his duty to advance his own funds, but always in his power to put himself in cash from the estate.¶

* iv. Mass. Rep. 358. † xii. 199. ‡ iv. 318. § i. 101.
‖ viii. 131. ¶ ix. 37.

[a] The general rule has been, not to charge an executor with interest, when his account is settled in the ordinary course. The reason is, that he is not at liberty to risk the money belonging to the estate; and is to be always ready to pay it over according to the directions of the will, or the decree of the Probate Court.

This rule admits of an exception, when it shall appear that the executor has actually made use of the money; and this fact may be proved by direct testimony, or may be inferred from a long delay in settling his accounts, or in paying over balances in his hands, after they have been demanded; and perhaps from other circumstances. [b]

The administration account, especially if it is not settled within the limited period, ought to contain a specification of the times, when the several credits were received.*

Course of Proceeding.

The manner of preparing and exhibiting an account for settlement, and of proceeding with it before the Court, is much the same at present, as formerly; except that due notice to the heirs or others interested, where they have not, in writing, acknowledged notice, or signified their assent to the allowance of the account, is now considered to be indispensable.

The administrator, or other accountant, first credits the estate with the amount of the personal estate, as contained in the inventory, and with other effects,

* xiii. Mass. Rep. 232.

as they have come to his hands. If from a sale, according to law, of personal estate inventoried, the proceeds are less than the appraised value, he charges the loss to the estate; if more, he credits the estate with the advance; exhibiting, in either case, a true and particular account of sales, to be filed with the account of administration. So any other losses or gains upon the inventory, taking place in the course of a faithful administration, are to be adjusted.

In any account after the first, the accountant credits the estate with the amount of credit in the last preceding account, and charges the estate with the amount of debt, instead of bringing forward the balance merely: so that every account settled exhibits the whole amount of the credits to the estate, and of the charges against it, up to the time of settling such account.

A prudent administrator will keep an accurate account, from day to day, both of the credits and effects collected and received, and of the debts and demands discharged, as well as of all necessary expenses incurred, in behalf of the estate; carefully preserving his vouchers for all monies paid. In transcribing and preparing his account for settlement, he will classify the charges so as to place together those of the same description;* and he will state the particulars

* So also he will do with the credits, where they are various and multiplied. It is difficult to suggest rules applicable to all cases; but an intelligent accountant will always perceive and endeavour to realize the convenience of order and arrangement in the credits and charges of his account, as well as in the articles of an inventory.

In respect to the inventory, one suggestion may be added

necessary to shew, on the face of the account, whence the credits are derived, and for what the charges are made. At the time of substantiating these, he will, for his own accommodation, as well as that of the Court, have his vouchers duly arranged in the order in which the charges are stated. Before exhibiting his account to the Judge, he will, if practicable, submit it to the examination of the heirs or others interested in the estate, and endeavour to obtain in writing their assent to its allowance; or at least their acknowledgment of having due notice of the time, when it is to be presented to the Court for settlement.

If, when the account is exhibited, no such certificate of assent or acknowledgment is produced, a time is assigned by the Court for considering the account, and also any private demand of the administrator or executor, or claims which he may have as a creditor of his testator or intestate ; and such notice is ordered to be given as appears to be required, in like manner, as before stated in the case of a will presented for probate.

When the executor or administrator has any such private demand to exhibit, it is to be particularly sta-

here to what is said under that head. In the case of a *testate* estate, it is proper that all the articles, contained in the *same specific legacy*, should be put together for the convenience of the executor in settling his account.

Guardians of several minors will remember that a distinct account must be rendered for each ward. The importance of keeping a daily and particular account of credits and charges with their wards will not escape the attention of guardians of any description.

ted in a separate account, and presented together with his account of administration; and, at the time of settling the latter, he will be prepared with the necessary evidence to support the former; unless it is admitted by the heirs or others interested in the estate, or unless it is agreed to submit it to reference pursuant to the statute. The evidence required is of the same nature as might have been necessary, had the demand been settled in a Court of common law.

When the accountant is unable to appear personally before the Court, and there is sufficient cause for a *dedimus* to issue to administer the oath to him; such cause is to be stated in writing to the Court by the party applying for the commission to issue.

A *dedimus* may in like manner be granted on any proper occasion, when required; as for administering the oath taken to an inventory, affidavit, or list of debts, although the statute has regulated the return of the commission in the case of accounts only.

ORDER OF DISTRIBUTION AMONG HEIRS.

By the provincial statute of distributions, the Judge of Probate, upon adjusting an administrator's account, and allowing for debts and just expenses of all sorts, was directed to make and order a just distribution of the remaining goods and estate, in the manner therein provided. The law has continued substantially the same through all the revisions of our statute of distributions. The obligation of the administrator, by his bond, has always been, to deliver and pay the

balance remaining upon his account " to such person or persons, respectively, as the Judge of Probate by his decree, or sentence, pursuant to law, shall limit and appoint."

Statute Provisions.

When any person dies possessed of personal estate, not lawfully disposed of by last will, after deducting the widow's allowance, if any, and the intestate's debts, with the charges of his funeral, and of settling his estate, the residue shall be distributed among the same persons, in the same proportion, to whom the real estate descends. The husband of an intestate, however, is entitled to the whole of such residue; and the widow of an intestate, if there be issue, is entitled to one third, if there be no issue, to one half, and if there be no kindred, to the whole.

In the distribution of the personal estate, alienage in the person claiming a distributive share, as issue, widow, or otherwise, is no impediment to his receiving it.*

When an heir has a suit brought upon the probate bond for his distributive share of the personal estate, he must exhibit a copy of the decree of the Probate Court, ascertaining its *quantum*, and shew that he has demanded it of the administrator.†

Before payment of a legacy or distributive share, the executor or administrator may require bonds to be given to himself by the legatee or heir, who is entitled to receive it, if the Judge of Probate deems it

* Stat. 1805, c. 90. † Stat. 1786, c. 55.

reasonable, with such surety or sureties as the Judge shall approve, with condition, that the legatee or heir, to whom the same is paid, shall refund a proportional part, or otherwise indemnify the executor or administrator against any demands, which may be made against the testator or intestate.*

Judicial Decisions.

The personal effects of a deceased intestate remaining after his debts are paid shall be distributed, according to the law of the state, to which at his death he was subject.†

If in fact the deceased had his home in another state, his effects are to be distributed here according to the laws of that state, or transmitted thither for distribution by the administrator there.‡

Advancements of personal property are to be deducted from the distributive shares of the personal estate of an intestate, belonging to the children advanced, if such shares are adequate thereto.§

Course of Proceeding.

Formerly, it was not usual, in any case, to make a decree or order of distribution upon the final settlement of an administrator's account. Now, it is considered proper to pass such decree, in every case, where a balance remains in the administrator's hands to be apportioned and distributed among heirs.

* Stat. 1817, c. 190. † iii. Mass. Rep. 514. ‡ xi. 256. § xvi. 200.

A written representation is to be made to the Court by the administrator, or some other party, containing a clear statement of the names and kindred of all the heirs, among whom the personal estate is to be distributed. A decree is passed ascertaining each one's share, and an order issued, directing the administrator to distribute and pay the balance in his hands accordingly.

If an executor or administrator thinks it necessary to exact bonds of any legatee or heir, pursuant to the provisions of the statute, he will represent in writing the circumstances which render such precaution reasonable, and the Judge of Probate, after notice to the party, will determine as the case may require.

PARTITION OF REAL ESTATE AMONG HEIRS OR DEVISEES.

By the provincial statute of distributions, passed in 1692, Judges of Probate had authority to order a division of the real estate among heirs; and, in 1752, they were also empowered to cause partition to be made among devisees.

The statute revising these provincial acts, passed in 1784, preserved the provisions distinct for causing partition under authority of the Judge of Probate, among heirs, and among devisees. The probate law of 1818, which repealed the principal parts of the statute last mentioned, condensed together these distinct provisions, cleared them of some obscurities, and established a uniform mode of proceeding in both cases.

Statute Provisions.

The real estate of an intestate descends in equal shares to his children, and to the lawful issue of any deceased child, by right of representation: and when the intestate leaves no issue, it descends to his father; and when there is neither issue nor father, it descends in equal shares to the intestate's mother, if any, and to his brothers and sisters, and the children of any deceased brother or sister, by right of representation; and if the intestate leave no issue, father, brother or sister, then it descends to his mother, if any; but if there be no mother, then to his next of kin, in equal degree: The collateral kindred, claiming through the nearest ancestor, to be preferred to the collateral kindred claiming through a common ancestor more remote; and the degrees of kindred, in all cases, to be computed according to the rules of the civil law; and when there is no kindred, the same shall escheat to the Commonwealth for want of heirs; saving always to the intestate's husband his tenancy by the curtesy; and to his widow, her dower at the common law, unless she is lawfully barred of the same.

But when any child dies under age, not having been married, his share of the inheritance, that came from his father or mother, shall descend in equal shares to his father's or mother's other children then living respectively, and to the issue of such other children as are then dead, if any, by right of representation.

When the issue or next of kin to the intestate, who

are entitled to his estate, are all in the same degree of kindred to him, they shall share the estate equally, otherwise they shall take according to the right of representation.

All gifts or grants of any estate real or personal, made by the intestate to any child or grandchild in advancement of his portion, and which is expressed in the gift or grant, or otherwise charged in writing by the intestate, or acknowledged in writing by the child or grandchild, as such advancement, shall be estimated in the distribution and partition of the intestate's real and personal estate, as part of the same; and the estate so advanced shall be taken by such child or grandchild, towards his share of the intestate's estate, at the same value as charged or acknowledged, if any be expressed, otherwise at its value when given.*

Whenever in the settlement of the estate of a person deceased, there is real estate to be divided among heirs or devisees, the Judge of Probate shall, by warrant directed to three discreet and disinterested freeholders, who are to be under oath, cause such real estate, situated in one or more counties of the Commonwealth, to be divided among the heirs or devisees of the person deceased, pursuant to his will, or to the laws regulating the descent and distribution of intestate estates.

Where such real estate cannot be divided among all the heirs or devisees, or their legal representatives, without great prejudice to, or spoiling the whole, the Judge of Probate may assign the whole to one, or to

* Stat. 1805, c. 90.

so many of the heirs or devisees, as the same will conveniently accommodate; always having due regard to the terms of the devise, and also preferring males to females, and among the children of the deceased, elder to younger sons. If any heir or heirs, devisee or devisees, to whom any real estate is so assigned, do not accept the same, and make or secure payments to be made, as the Judge of Probate shall direct; then the same may be so assigned to one or more of the other heirs or devisees successively; in every case, those to whom the same is so assigned, paying to the others, their heirs or assigns, their proportionable shares of the true value thereof, on an appraisement to be made by the committee; or giving such sufficient security to pay the same, and in such convenient time or times, as the Judge of Probate shall direct, with lawful interest until paid.

No conveyance, made by any heir or devisee, of his interest or estate in the lands of any testator or intestate, takes from the Judge of Probate his jurisdiction thus to divide and assign the same among the heirs or devisees.

The division of such real estate, being so made and accepted by the Judge of Probate, and recorded in the probate office, is binding on all persons interested. But when any minors, or persons *non compos*, or otherwise incapable to take care of their estates, or any persons without the Commonwealth, are interested in the deceased's estate, or in any estate with which it lies in common, guardians must be appointed for such minors, or others thus incapable, and some suitable person must be appointed to represent and act for

such absent persons. And before an order for such division can issue, it must be made to appear to the Judge of Probate, that the several persons interested in the estate, if living within the Commonwealth, and the attorney, if any, of such as are absent from the Commonwealth, or the persons appointed to represent them, have had such notice of the partition, as the Judge may have ordered, and an opportunity to make their objections.

In the case of a devised estate, the Judge of Probate may order the whole, or that part whereof partition is applied for, to be divided among the devisees.

No partition is to be ordered by the Judge of Probate, when the proportions of the heirs or devisees appear, by the tenor of the will, or any other matter in writing, to be disputable or uncertain.

When any messuage, tract of land, or other tenement, shall be of greater value than the share of any party, and the same cannot, without great inconvenience, be subdivided, it may be assigned to one of the parties only; such party paying to the other parties, who have less than their shares, as the committee shall award.

When any party neglects or refuses to pay his just proportion of the charges attending the partition, the Judge of Probate may issue a warrant of distress against the delinquent for the amount of his proportion with the costs of such process. But an account of the charges must be first exhibited to the Judge, and the just proportion of the delinquent party settled and allowed; such party having had due notice to be present at the settlement and allowance of it.

The Judge of Probate may order a division of the reversion and remainder expectant on the determination of any estate in dower, in like manner as the division of the other parts of the estate, either at the same time, or upon the determination of the estate in dower, at his discretion.*

When any part of the real estate of a person deceased lies in common and undivided with that of any other person or persons, the Judge of Probate may direct the committee to sever and divide the real estate of the deceased from that with which it lies in common, according to law; but he may cause such real estate to be divided among heirs or devisees, or dower to be assigned therein, without first requiring the same te be severed, whenever the nature of the case permits, and the parties, applying for such division or assignment, request it. And when such real estate lies in common with that of other persons unknown to the petitioner for partition, public notice shall be given to them by the Courts of Probate in the same manner, as it may be done by the Courts of Law.

All partitions of real estate, made under the authority of any Court of Probate, when the same is held in common with a stranger; and all distributions of the real estate of any testator or intestate, lying out of the county, in which such Court is holden, must be recorded by the Register of Deeds in the county, where the estate lies.†

* Stat. 1817, c. 190. † Stat. 1820, c. 54.

The brothers and sisters of the half blood of any person dying intestate, and leaving no father nor issue, are entitled to share equally with those of the whole blood.*

It is always proper to charge the advancement, if made in money or chattles, first against the personal estate. For it is in the nature of a debt due the estate, which, if it can be paid by money already in the hands of the adminstrator belonging to the heir, ought to be so paid; rather than to diminish the inheritance of the heir, who may have been advanced, for the benefit or convenience of other heirs, who may desire a larger portion of the real estate, than would otherwise descend to them.†

When different Courts have concurrent jurisdiction, the one before whom proceedings may be first had, and whose jurisdiction first attaches, must necessarily have authority paramount to the other courts.

The Judge of Probate, therefore, has no power to appoint commissioners to make partition of an intestate's estate among the heirs, pending a petition for partition, instituted by some of the heirs in the Court of Common Pleas.‡

A decree of the Judge of Probate assigning the whole of the real estate to the eldest son, upon condition of his paying to the respective heirs their proportion of the appraised value, is not confor-

* xii. Mass. Rep. 490. † xvi. 201. ‡ xvi. 167.

mable to the statute, authorizing such assignment. There must be either payment, or security, when the decree is passed.*

(a) The power of the Judge of Probate has been often improperly exercised by a misconstruction of the words "without prejudice to or spoiling the whole." These words import a case when the shares divided, from the nature of the estate, would be worth but little; as in the case of a dwelling house, or some small parcel of land, the respective shares of which, holden in severalty, would be of much less value than when holden together. But the construction has in some cases been extended, with the design of making convenient farms for one or more of the children, uniting different and distinct parcels of land for this purpose, when a division among all the heirs would not have lessened in any degree the profits, which were received from the whole together.

(b) The manner of settling lands on two children jointly is new to us. If the lands must be holden jointly, they may as well be holden jointly by all the children, as by two.

The practice is, to direct the commissioners to divide the lands into as many shares, as can be done without prejudice to or spoiling the whole. The return contains this division by metes and bounds, or by some certain description, with the appraisement of each part. If there are as many shares, as children or next of kin, each one has

* xvi. Mass. Rep. 122.

a share, accounting for its appraised value. If there are not so many shares, the Judge assigns as many shares, as are returned, to as many of the next of kin, as will accept of them, proceeding according to the priority prescribed by the statute.*

Course of Proceeding.

It was formerly the practice for the Judge of Probate to issue his warrant to the commissioners, for making partition among heirs or among devisees, upon a verbal application of any one or more of them, without notice to others interested, and without any order or decree in writing. No record was made of the transaction, nor any evidence of the proceedings preserved in the probate office, until after the return of the warrant.

(e) The present practice is, to require a written petition from the heirs or devisees applying for partition, and and also due notice to be given to others interested, who do not join in the petition, or signify their assent to the appointment of the commissioners, and to pass a decree in writing, before proceeding to issue the warrant. The petition and the decree are both recorded.

The petitioners set forth in their petition the name and last place of abode of the testator or intestate, the situation of the estate to be divided, and whether they claim as heirs, or as devisees. They should also represent the names, places of residence, and, in the case of heirs especially, the degrees of

* iv. Mass Rep. 121.

kindred to the intestate of the several persons, among whom partition is to be made; and all other facts and circumstances of the case, which it is necessary for the Court to understand, in order to proceed in the same, pursuant to the provisions of the statute. As when the estate lies in common and undivided with that of other persons, known or unknown; or when minors or others under legal disabilities, or absent from the Commonwealth, are interested; such facts are to be represented in the petition. The statutes and judicial decisions above cited and referred to, with a knowledge of the circumstances of their own case, will always enable the petitioners to judge of the facts necessary to be stated.

When minors, or others legally incapable, or without the Commonwealth, are interested in the estate to be divided, the appointment of suitable guardians and agents for them respectively, is to be attended to, before the warrant for making the division is issued. Such guardians and agents, with all others interested, are to have opportunity of being heard on the petition, and in the appointment of the commissioners; as well as of attending them in making the partition, and being present at the Court, when the return of their doings is presented for acceptance.

It is usual, in cases not disputed, for the parties to join in the petition for partition, and also to signify in writing, accompanying the return of the commissioners, their assent and agreement, as to the assignment of the several shares, and the sums of money, if any, to be paid and received by them respectively. As to the payment of such sums, or the

manner of giving security therefor; and also as to estimating and adjusting advancements; as to proceeding when the estate lies in common with that of other persons, known or unknown, whether it is to be severed, or a division made among the heirs or devisees, without a severance; and as to obtaining a warrant of distress against a delinquent party for his proportion of charges attending any partition; the statutes and judicial decisions must always be regarded, and will generally be found a sufficient guide.

OCCASIONAL APPLICATIONS.

The view, which has been given of the principal and ordinary applications and proceedings in the Probate Court has extended these pages so far beyond the limits contemplated, that a very cursory notice only will be taken of those, which are less important and not of frequent occurrence. In respect to some of these, the statute provisions, and the mode of proceeding pursuant to them, have been already sufficiently noticed; as in the case of the resignation or removal of trustees; of extending the time to commissioners on insolvent estates; of allowing further time to settle the account of administration on such estates; of granting a further time to consider of an order for the sale of personal estate; of issuing a *dedimus* to administer the oath to an account, and of requiring bonds from a legatee or heir to an executor or administrator, on payment of a legacy or distributive share. In respect to others, the statute provisions have been cited and referred to, without a notice of the applications to the Pro-

bate Court pursuant to them; as granting a *dedimus* to take the affidavits of subscribing witnesses to a will; citing a minor to make choice of a guardian; licensing a guardian to transfer stock; allowing a guardian to purchase the right of dower in his ward's estate; and allowing the executor or administrator of a deceased creditor, to join other creditors in the discharge of an insolvent debtor.

Of these it may be sufficient to observe, that the application, in each case, is to be made in writing, and to present the necessary facts for the consideration and proceedings of the Court. It is proper to add, however, that in the case of an application for a *dedimus* to take affidavits, parties adversely interested must always have notice, and an opportunity to make what interrogatories they may think necessary to accompany the commission.

Some other occasional applications deserve more particular consideration.

COMPLAINT AGAINST A PERSON SUSPECTED OF EMBEZZLEMENT, &c.

By the act for the distribution of insolvent estates, passed in 1696, the Judge of Probate was authorized to summon before him any person suspected by an executor or administrator of concealing, embezzling, or conveying away any effects of the deceased testator or intestate, and to put him upon oath for the discovery of them; and if such suspected person was so connected with the deceased in his last sickness, as to make the suspicion more violent, and should refuse to clear

himself on oath, the Judge was empowered to commit him to prison. By an additional act in 1700, executors and administrators having been thought too remiss in complaining of such persons, it was provided that any heir, creditor, legatee, or other person interested in the estate, might make the complaint. In 1736, a like power was given to the Judge of Probate over persons complained of by any heir or creditor, as well as guardian of a lunatic, for embezzling the ward's property. In 1752 such power was extended to the case of persons, who had been intrusted by an executor or administrator with any part of the deceased's estate, and who should refuse, when cited, to render a full account of any effects, bonds or other papers, taken by them, and of their proceedings in behalf of such executor or administrator.

All these powers, and even with less limitation in some respects, were given to the Judges of Probate, upon the revision of the provincial statutes after the constitution was adopted.

Statute Provisions.

The Judge of Probate has power to call before him any person suspected and complained of by any executor or administrator, heir, legatee, or other person interested, as having concealed, embezzled, or conveyed away any of the money, goods or chattels, left by the testator or intestate, and to examine him upon oath for the discovery thereof. And if such suspected person refuses to be examined, or to answer interrogatories, upon oath, respecting the same, the Judge

may commit him to the common jail of the county, till he consents to be examined, or is released by the complainant, or by order of the Supreme Judicial Court.*

Upon the complaint of any heir, creditor, or other person having claims in expectancy to the estate of any lunatic, &c. as well as on complaint of the guardian, the Judge of Probate may proceed against any person suspected of embezzling the ward's effects, in the same manner, as for embezzling the effects of a deceased person.†

The Judge of Probate has power also to convene before him any person, who has been entrusted by an executor or administrator with any of the deceased's estate, having been assisting to such executor or administrator; and who has refused, upon a citation for the purpose, to appear and render a full account upon oath, of any money, goods or chattels, bonds, accounts or other papers, belonging to the estate, which he has taken into his hands or custody; and of his proceedings in behalf of such executor or administrator. And if such person refuse to render such account, the Judge may proceed against him, in the way and manner before directed, in the case of a person suspected of embezzlement, who refuses to answer interrogatories upon oath.‡

Judicial Decisions.

It is at least questionable, whether an executor or administrator can be, under any circumstances, liable

* Stat. 1783, c. 32, s. 11. † Stat. 1783, c. 38.
‡ Stat. 1783, c. 32, s. 12.

to an examination pursuant to the statute of 1783, c. 32, s. 12. But if he is, it is very clear that the authority of the Court, under that provision, extends only to an examination for the purpose of discovery. No other power is given by the statute; and in that extent it is analagous to the power exercised by the Court of Chancery in England, upon a bill for discovery. The examination is not to be controlled by other evidence. No relief can be granted upon it: the remedy being employed to enable the complainant to bring an action at law, or to furnish evidence in a suit depending.*

Course of Proceeding.

The manner of proceeding, on a complaint for embezzlement, &c. is probably much the same as heretofore, except that formerly the interrogatories and answers were generally put on file merely, but are now uniformly recorded.

The complaint is made in writing, sworn to by the complainant, and contains as clear and distinct a statement as possible of the facts, which are the subject of complaint, and respecting which the interrogatories are to be framed. The decree of the Court thereupon is made in writing; and if it is determined that a citation shall issue, a time is assigned for the hearing, and the citation, together with a copy of the complaint, is to be served upon the party, fourteen days at least before the time assigned. The interrogatories are put to the party in writing, to which his answers are made in like man-

*iv. Mass. Rep. 322.

ner, and both are recorded under an order of the Court.

It is very rare that a warrant for apprehending the person complained of, and bringing him before the Court, is necessary; and still more rare to have occasion for exercising the extraordinary power of committing him to prison.

REMOVAL OF EXECUTORS OR ADMINISTRATORS, AND DISMISSION OF GUARDIANS.

There appears to have been no statute providing for the removal of executors and administrators till 1784; nor for the dismission of guardians till 1790: the latter act was revised and incorporated in the probate law of 1818; which contains also the provision, before noticed, for removing trustees.

Statute Provisions.

When any executor or administrator resides without the Commonwealth, and neglects, after due notice from the Judge of Probate, to render his account of administration, and make a settlement of the estate with the creditors, legatees or heirs; or when any executor or administrator becomes insane, or otherwise incapable of, or evidently unsuitable to discharge the trust reposed in him, the Judge of Probate has power to grant letters of administration with the will annexed, or otherwise, to such person within the Commonwealth, as he may think proper. The administrator so appointed has the same authority to administer the estate of the deceased, not al-

ready administered upon, and is subjected to the same duties, as if the executor or administrator so removed, were actually dead.*

The Judge of Probate may dismiss any guardian of a minor, lunatic, or spendthrift, whenever it appears to him that necessity or expediency requires it, and appoint another in his place; first giving notice to such guardian, in writing, fourteen days at least before the hearing, to appear and shew cause why he should not be so dismissed.†

Judicial Decisions.

Although the statute, which gives to the Judge of Probate authority to remove executors and administrators, seems predicated on the case of one executor only, yet it is within its reason and equity, that if one of two or more executors should fall within the disabilities specified, the remedy should be applied, although letters of administration may not in such case be necessary.

A determination by an executor to resist payment of a debt due to his testator, until compelled by a judgment of Court, may in some cases be deemed a sufficient cause for removing such executor; it being unsuitable that he who represents the estate, and without whose agency a suit cannot be conducted, should remain in office, when such suit may be necessary to coerce the payment of the debt. But it may not always be necessary to take this step. For as the executor has given bond for the faithful execu-

* Stat. 1783, c. 24. † Stat. 1817, c. 90.

tion of his trust, and as he must be supposed actually to have received, for the purposes of his trust, a debt due from himself, so that he and his sureties will be responsible on their bond for such debt, the interest of the estate may require that such security should be preserved by continuing the executor in office; rather than those entitled under the will should be deprived thereof, by discharging the trust, and of course cancelling the bond.

The statute gives a very broad discretion to the Judge, evidently intending not to define or limit the disabilities, which should be the causes of removal; but to leave room for the application of the power to all cases, which may occur to render the execution of a will, or the administration of an estate, perplexed or difficult.*

Course of Proceeding.

(a) The application or complaint for the removal of an executor, administrator, or guardian, pursuant to the statutes respectively, is to be made in writing, and to contain a clear statement of the cause or causes requiring it. A time is assigned for the hearing, and a copy of the petition or complaint, is served upon the party with the order of the Court thereon. The same course is pursued in giving notice to an executor or administrator, as is directed in the case of dismissing a guardian, although, in respect to the former, the statute is silent on the subject of notice.

* xii. Mass. Rep. 199.

REQUIRING NEW BONDS.

Statute Provisions.

When the sureties in any probate bond given by executors, administrators, guardians or trustees, are evidently insufficient for the purpose of such bond, the Judge of Probate, on the petition of any person interested, and after giving notice to the principal and sureties in such bond, may require from time to time, new bonds, with sufficient surety or sureties in the case; and if such executors, administrators, guardians, or trustees, shall not, within a reasonable time, give such new bonds, they shall be removed from office and others appointed in their stead. The original bonds, notwithstanding such removal, remain in force for all the purposes for which they were given.*

Course of Proceeding.

The statute is a sufficient guide in the application and proceedings for requiring new bonds. The petitioner, in representing the insufficiency of the bond, will state the names of the principal and the sureties therein, with the date of their bond. A time is assigned for considering the petition, and notice given as the statute directs, generally fourteen days at least before the hearing. If on the hearing, new bonds are judged to be necessary, a decree is made accordingly; and such time, as seems reasonable, is allowed

* Stat. 1816, c. 94.

for giving them. If they are not given at the time limited, the decree of removal is then passed.

CITATION TO RENDER AN INVENTORY, OR TO ACCOUNT.

The statute for regulating the proceedings on probate bonds, referred to in the case of the Account of Administration, is applicable here.

Judicial Decisions.

(a) It is the duty of an executor or administrator to render an inventory, upon oath, of whatever effects of a deceased testator or intestate have come to his hands. He may be cited to render this inventory; or, in other words, to account. When the administrator refuses or neglects to account upon oath for such property of the intestate as he may have received, especially if he has been cited by the Probate Court for that purpose, execution, after judgment recovered upon the probate bond, shall be awarded against him for the full value of the personal property of the deceased, that has come to his hands. And when it appears that the administrator has received the personal property of his intestate, and has not exhibited, upon oath, a particular inventory thereof, execution shall be awarded for the whole penalty of his administration bond.

The statute, having directed the course of proceeding in a suit upon the bond, and the judgment to which the party becomes liable, is to be construed

if not as determining exclusively, yet as unquestionably opening the remedy to which the parties may resort, where an administrator being cited has refused to account, or has neglected to render an inventory, having in his hands personal property of the testator or intestate.

It is impossible to construe the statute as requiring, in a case of this kind, of the party at whose promotion an action is to be brought upon the probate bond, the particular evidence there directed, and made essential in certain instances, to the end that an execution, when judgment is recovered upon the bond, may not *always* be issued in the name of the Judge of Probate; but, in those instances, in the name of the party, for whose particular use and benefit the money for which execution issues, is to enure.

The bond is a lawful bond, made to the Judge of Probate, as the trustee of all parties concerned; and his right of action, although to be exercised at his discretion, or under the judicial direction of the Probate Court, except in the instances specially provided for by the statute, is not taken away by any negative words or necessary implication.*

In an action against an administrator upon his bond for faithful administration, to charge him on the ground of his having received money for which he has not accounted, it must appear that the money was received by him before the rendering of his account of administration; or, if afterwards, that he has been cited to render an account by the Judge of Probate.†

* iv. Mass. Rep. 323. † xvi. 129.

Course of Proceeding.

Formerly it was usual for the Judge, when verbally requested to cite any person to account, to write him a letter on the subject, of which no record or notice was taken in the office; and, if this was not regarded, a written complaint and citation would follow.

Now the first step is, for the party applying for such citation, to make his complaint in writing to the Probate Court, stating the facts and causes, which require the process. He will of course previously ascertain from the records the time, when the party complained of was appointed to his trust, and the proceedings which have taken place; that he may correctly represent what acts of duty have been neglected, and for what length of time. If it is decreed that a citation shall issue, a time is assigned for the return of it; and the citation with a copy of the complaint, or the substance of it, is served upon the party, fourteen days, at least, previous to such time. If he neglects to appear, or refuses to account, the fact of such neglect or refusal is entered of record, with the other proceedings in the case, by order of the Court.

LICENSE TO SUE A PROBATE BOND.

Judicial Decisions.

No action can be sustained upon an administration bond, (except by a creditor having his debt ascertain-

ed by a judgment or decree of distribution, or an heir having the *quantum* belonging to him ascertained) without an assignment or license by the Judge of Probate.

By the act for regulating the proceedings on probate bonds,* special provision is made for creditors and heirs, whose demands are ascertained in the manner therein specified; and the practical construction of this provision has been, to give a right to such creditors and heirs, to maintain an action on the bond, without their first applying to the Judge of Probate for authority. They are in fact made plaintiffs in the action; and the name of the obligee is used, only to avoid the technical objection to the assignability in law of a chose in action. But legatees are not thus provided for; nor are creditors or heirs, whose demands have not been ascertained: and therefore this provision of the statute does not enlarge their rights.

For any breach of the condition of the bond, other than those specified in the statute, the Judge of Probate can alone sue; and the judgment for the penalty, or in chancery for damages, as the case may require, will be in his name; and the money will be received by him, as trustee of those who may establish their right, in the Probate Court, to any portion of it.

It follows necessarily, that the Judge of Probate has a right to consider whether it is proper that the bond should be sued: for in these cases, there being no indorsement necessary, by those who instigate the suit, the Judge of Probate is answerable for costs, in case

* Stat. 1786, c. 55.

the suit shall fail. He must therefore have an opportunity to require indemnity, and also to judge whether there is reasonable cause for commencing the suit.

It has been urged upon us that the Judge of Probate may possibly refuse permission, when the rights of a party may require a suit. But if an application be made to him in writing, and he refuse, an appeal will lie to the Jupreme Court of Probate, where the reasons for the refusal will be considered. It is however probable that, in all cases of application for leave to sue the probate bond, the Judge will first cite the obligor; and if there is probable cause for the suit, he will not impede the course of justice.*

Course of Proceeding.

The petition for license to sue a probate bond should clearly state the facts necessary for the consideration of the Judge of Probate, or proper to be notified to the adverse party. A time is assigned for considering the petition, and an order of notice with a copy of the petition, or containing the substance of it, is to be seasonably served upon the obligor, that he may be heard on the subject. The decree of the Court thereupon is made in writing, and such other proceedings had, as the case may require.

CERTIFICATE OF HEIRSHIP.

The heirs of persons deceased in the public service have sometimes occasion for the Judge of Probate's

* xvi. Mass. Rep. 524.

certificate to prove their heirship; and as administration is not commonly taken on the estates of such persons, the certificate cannot be made from the records, without first establishing the fact by other evidence.

The course of proceeding for this purpose is as follows: those who apply for such certificate make their request in writing to the Judge, at some Probate Court, representing the facts necessary to shew that they are legal heirs of the deceased, accompanied by the affidavit of some disinterested person, or persons, proving the facts stated. If the evidence is satisfactory, they are adjudged to be such heirs, are so entered of record, and certificate thereof made, as may be required.

APPEALS.

Under the first Charter, an appeal lay from the judgment and decree of any County Court in probate matters, as well as others, to the Court of Assistants. The party appealing was required to put in security for prosecuting it to effect, and to give in to the clerk of the Court appealed from, in writing, "without reflecting on court or parties by provoking language," under his own or his attorney's hand, the grounds and reasons of his appeal, six days before the sitting of the Court appealed to. If he failed to prosecute it, he forfeited, besides his bond, forty shillings to the country. Under the Province Charter, all appeals from the Judges of Probate were heard and tried by the Governor and Council; and six months from the time of passing any decree was allowed for claiming an appeal. After the present Constisution was adopted, this appellate juris-

diction was given to the Supreme Judicial Court, and the time for claiming any such appeal was limited to one month.

Statute Provisions.

Any person aggrieved may appeal from any order, sentence, decree, denial or decision of any Judge of Probate to the Supreme Court of Probate. The appeal must be claimed within one month after the decree, and the bond to prosecute it given within ten days after the appeal is claimed and granted. The appellant must file the reasons of appeal in the Probate Court appealed from, within ten days after the bond is given, and serve the adverse party or parties with an attested copy of such reasons, fourteen days at least, before the sitting of the Court appealed to, being the term of the Supreme Judicial Court, to be holden within the county, next after the expiration of thirty-four days from the time of claiming the appeal.

Persons beyond sea, or out of the United States, not having a sufficient attorney within the Commonwealth, at the time of the decree, have one month after their return, or constitution of such attorney, to claim an appeal.

Any person, who by mistake, accident or otherwise, has failed to claim his appeal agreeably to the provisions of the law, may, within one year from the decree, petition the Supreme Court of Probate, and if it appears that he has not lost his remedy by his own negligence, the Court will for sufficient cause grant and sustain the appeal.

The appellant having filed his bond and reasons of appeal, and given notice to the adverse party, according to law, all further proceedings are staid until the final determination in the Supreme Court of Probate.†

Course of Proceeding.

The statute clearly points out the proceedings in claiming and pursuing an appeal from the Probate Court. The appellant may make his claim in writing, or by parol, filing his reasons of appeal pursuant to the law. The practice in this county, however, has always been to claim and to grant such appeal in writing. And this, although not expressly required by the statute, appears to be the safest and most convenient course. The bond, as in other cases, must be submitted to the Judge for his examination and approval.*

* It is manifest from the provisions of the statute respecting appeals, as well as from the principles of law before considered, that due notice ought to be given of all proceedings in the Probate Court, to all parties entitled to appeal. But the delay and expense of formal notice under an order of the Court may, in most cases, be avoided by care and attention in obtaining the written assent, or acknowledgment of due notice, from such parties, or serving them with proper notice in writing, returning to the Court a copy thereof, with the affidavit of the person who delivered the notification to them. By seasonably considering of the various applications, that may be made at the same court and being prepared to make them, executors and administrators would ordinarily find but few journies to the Probate Court to be necessary.

† Stat. 1817, c. 190.

CONCLUDING OBSERVATIONS.

The particular view, which it was proposed to give of the present practice and course of proceedings in the Probate Court of this county, is here closed. In the great variety of details considered, many errors and omissions will probably be found to have escaped the attention of the compiler, and these he fears have been increased by the pressure of ill health, under which he has been obliged to attend to this publication in its progress through the press. It can hardly be necessary to observe, that he does not exhibit this system of probate proceedings, as being perfectly matured, or as one in which he might not still make some improvements. For obvious reasons, he is solicitous to present to the people of this county, and to his friends elsewhere, a full view of the practice and course of proceedings in his Court, as they existed at the period when the public inquiry concerning them was commenced; and which he had adopted with much care, according to his best judgment, in the hope of improving in some degree the administration of the laws within the department committed to him.

In dismissing the subject, it may be proper for him to add some observations upon the proceedings of the House of Representatives respecting his official conduct; especially as the result of these proceedings was inscribed on the journals of the House, and exhibited to the public, without notice being given to him to make any defence or explanation, and as such a pre-

cedent appears to be highly important in a general point of view.

A memorial was addressed to the Honorable House, at their summer session, by sundry individuals, representing that complaints had been made by people who have business in the Probate Court of the county of Essex—that the Register "has demanded and taken much larger fees for services done in said Court, than the law allows and provides, and has refused when required to make out a particular account of the services there done, as the law directs;" and that the Judge "acquiesces therein, by his allowing the same in settlement with them that pay it;" also, that the Judge and Register "have re refused to give to applicants the requisite and necessary information respecting the settlement of estates."

The memorial, being read in the House, was immediately referred to a committee of seven, "with power to send for persons and papers:" who thereupon instituted an inquiry, in the course of which were "examined such witnesses, as were named by and on behalf of the memorialists." A statement of such facts, as appeared from this examination, with decisions in part favourable, and in part unfavourable to the probate officers concerned, was the result adopted by the Honorable House, and ordered to be entered on their journals.

However aggravated these complaints might have appeared to the Honorable House, on the face of the memorial; yet inasmuch as the memorialists, so far from alleging any grievances of their own, or specifying any in behalf of others, did not state any

cause of complaint as within their own knowledge, nor intimate (what in fact was never the case in a single instance) that the allowance of a charge for fees, in any account, had ever been objected to before the Judge; it should seem that some further information might have been desirable, previous to entering upon this most solemn inquiry; an inquiry, which alone could not fail to create a public impression, that the House had well grounded suspicions of gross official misconduct. But after entering upon such an inquiry, it would seem not less reasonable, that the officers, who were the objects of it, should have had an opportunity of justifying their conduct, before the adoption of any definitive result, exhibiting facts and decisions affecting their reputation.

This result, as might have been expected from an *ex parte* inquiry, contains material errors, presenting a very incorrect view of the practice and proceedings in the Probate Court of this county. The course of proceeding in granting letters of administration is described as including various orders by the Judge, which he in fact never passes on such occasions, and has never deemed to be necessary; and it is no less erroneously represented that, in all other cases, a similar course is pursued.

The approbation, however, which is expressed of the various services performed by the Probate Court, as being "some of them expressly required by different statutes, others by the Supreme Court adjudged to be necessary, and, so far as they could find, all of them useful," sufficiently manifests the candor of the

Honorable House.* It must be presumed, therefore, that whatever of error appears in their proceedings is to be attributed to inadvertence in not sufficiently considering their constitutional province, and those fundamental principles in relation to parties accused, which are essential to every free government. The misapprehension of some of the witnesses examined doubtless led to the mistatements made in the facts reported; and possibly a like misapprehension, as to facts not reported, may have conduced to the decision, that "the Judge and Register have been so extremely cautious to avoid the appearance of being counsel to parties, that they have in some instances fallen into the opposite error."

As the grand inquest of the Commonwealth, the power of the House of Representatives seems to be limited to making inquisition in the manner of a grand jury, and presenting, if they find sufficient cause, for a hearing and trial before the proper tribunal: if so, the

* The Honorable House very properly notice the manifest imperfections of the law in relation to the probate department; justly observing that for a great portion of the business, now commonly transacted in all the Probate Courts, no fees are prescribed by the statute, and that in other cases great uncertainty exists: and they express a full conviction, that the probate law ought to be revised, with a particular view of establishing a uniform mode of proceeding, with such forms as may be found useful and necessary, and the fees to be paid therefor; believing that this cannot be more difficult here, than in proceedings at common law.

It is truly gratifying to find that the House of Representatives, on whom a reform in the law so greatly depends, are thus deeply convinced that such reform is necessary; and the expression

power of exhibiting the facts resulting from any such inquisition, with their opinion upon them as a definitive verdict, must be wholly assumed; and, when exercised against those who have no opportunity for defence or justification, it may become alike unconstitutional and unjust. And to most men, who have received and are in any degree worthy of the public confidence, a false or distorted view of their official conduct, coupled with imputations of error from high authority, cannot but be matter of serious concern. Although "life, liberty, and property" remain untouched, yet what is sometimes esteemed of more value than these may be sensibly affected; and the constitution has expressly guarded "character" as also among the essential rights of every individual—whether he holds an office or not.

The reputation and feelings of an humble individual are, indeed, of little concern to the community; but not so the consequences of an unconstitutional exer-

of their conviction is a pledge, that they will effectually pursue the object they have undertaken.

It is to be hoped that the unwelcome and humble nature of the task, in its various details, will not prevent a complete and thorough accomplishment of it. Much minute labor and attention may be demanded for this purpose, but probably not more than would be consumed in a formal public enquiry, which the present state of the law may again impose upon the House; and the benefit to the whole community would be incomparably greater. All who have any concern with Probate Courts would have reason to rejoice in such a public benefit; and none more than those who have had to sustain the delicate and arduous responsibility, created by the existing imperfections of the law and the want of settled forms of proceeding in these Courts.

cise of power by any department of the government. Especially should that power, which is designed to keep all other powers within their proper bounds, never transcend its own limits. For here there lies no appeal, no ulterior resort for the redress of wrong. The arbitrary exercise of such a power is necessarily a pure despotism; and should the high tribunal, in which it is lodged, ever be susceptible of undue excitement in their proceedings, it might become a despotism of the most formidable character to the subjects of it. And, let it once be established by any admitted precedent, who of our magistrates and judges may not be made its subjects? Let it be allowed, for the sake of inflicting a salutary correction, in a single instance, and the scourge may next be extended to the highest judicial officers of the Commonwealth. To such surely, to men worthy of exalted trusts, it could be no alleviation, that the infliction is only upon their character and their sensibility.